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No. (1)

In The
Supreme Court of the United States

KENNETH L. SMITH,
Petitioner,

v.

UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT, *et al.*,
Respondents,

KENNETH L. SMITH,
Petitioner,

v.

HON. MARY J. MULLARKEY, *et al.*,
Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

Kenneth L. Smith,
in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

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QUESTIONS PRESENTED

1. Does the Due Process Clause (and its state analogue) restrict the discretion of Article III judges (and their state equivalents) to the point where they are required to apply the authoritative pronouncements of this and other superior courts to properly ascertained facts in the controversy before them?

2. Does a litigant whose First and Fifth Amendment rights to due process of law, equal protection of the law and/or access to the courts have been deprived by the willful and intentional refusal of Article III judges to follow the established precedent of their Circuit have a cause of action under a *Bivens* theory, in light of developments in common and jus cogens international law compelling modern States to provide an "effective remedy" to citizens who have been denied them by government officials acting in their official capacity?

3. Is a state attorney general immune from civil suit for actions aiding and abetting a criminal act committed by his 'clients' who are public officials?

OTHER PARTIES TO THE PROCEEDING

The Respondents are the initial defendants who participated in the consolidated appeal in the Tenth Circuit. They are THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT; THE JUDICIAL COUNCIL FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT; HON. EDWARD W. NOTTINGHAM, District Judge, in his personal capacity only; HON. MARY BECK BRISCOE, in her personal capacity only; HON. STEPHEN H. ANDERSON, in his personal capacity only; HON. JAMES E. BARRETT; and HON. H. JEFFREY BAYLESS, in his personal and his representative capacity as the chief judge of the District Court, City and County of Denver; and KEN SALAZAR, in his personal capacity only [defendants in No. 04-1468] and HONS. MARY J. MULLARKEY; REBECCA LOVE KOURLIS; MICHAEL L. BENDER; GREGORY J. HOBBS, JR.; ALEX J. MARTINEZ; NATHAN B. COATS; and NANCY E. RICE, in their official capacities as Justices of the Colorado Supreme Court [defendants in No. 04-1470]. JOHN DOES 1-99 were named in the Complaint but did not file appearances or briefs in the appeal, as they have not been identified at this time.

TABLE OF CONTENTS

QUESTIONS PRESENTED

OTHER PARTIES TO THE PROCEEDING

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

STATEMENT OF THE CASE 12

SUMMARY OF PERTINENT FACTS 14

REASONS WHY THE WRIT SHOULD BE GRANTED 23

Absolute Judicial Immunity 24

Irregular and/or Unpublished Opinions . . 44

CONCLUSION 50

EXHIBITS 54

TABLE OF CASES AND OTHER AUTHORITIES

CASE **PAGE**

Anastasoff v. United States,
223 F.3d 898 (8th Cir. 2000),
vacated as moot, 234 F.3d 1054
(8th Cir. 2000) 43, 44, 45
Anderson v. Wilson, 289 U.S. 20 (1933) 27
Arnett v. Kennedy, 416 U.S. 134(1974) 47
Ashby v. White, [1703] 92 Eng.Rep. 126 ... 26
Board of County Commissioners v.
Umbehr, 518 U.S. 668 (1996) 24
Bolling v. Sharpe, 347 U.S. 497 (1954) 20
Busch v. Busch,
773 A.2d 1274 (Pa.Super. 1999) 36
Carey v. Piphus, 435 U.S. 247 (1978) 32
Chambers v. Baltimore & O. R. Co.,
207 U.S. 142 (1907) 12
City of Los Angeles v. Lyons, 481 U.S. 95 (1983) 23
Cohens v. Virginia, 16 U.S. 264 (1821) 12, 13
Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 27
District of Columbia Court of Appeals v.
Feldman, 460 U.S. 462 (1983) 15
Facio v. Jones,
929 F.2d 541 (10th Cir. 1991) 23
Green v. Branson,
108 F.3d 1296 (10th Cir. 1997) 49
Hall v. Bellmon,
935 F.2d 1106 (10th Cir. 1991) 49

CASE **PAGE**

Holland v. Harrington,
268 F.3d 1179 (10th Cir. 2001) 49
In re Smith, 10 F.3d 723 (10th Cir. 1993) 13, 16
James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 13
Kobler v Austrian Republic [2003] 3 CMLR 28 32
Maharaj v Attorney-General of Trinidad &
Tobago (No. 2) [1979] AC 385 32
Marbury v. Madison, 5 U.S. 137 (1804) 12, 13
Moragne v. States Marine Lines,
398 U.S. 375 (1970) 47
Murray v. the Charming Betsy,
6 U.S. 64 (1804) 29
Nelles v. Ontario, [1989] 2 S.C.R. 170 26
Pennington v. Coxe, 6 U.S. 33 (1804) 31
Pierson v. Ray, 386 U.S. 547 (1967) 26, 27
Planned Parenthood of Southeastern Pa. v.
Casey, 505 U.S. 833 (1992) 29, 47
Razatos v. Colorado Supreme Court,
746 F.2d 1429 (10th Cir. 1994) 23
Roe v. Ogden,
253 F.3d 1225 (10th Cir. 2001) 16, 17, 22
Roe v. Wade, 410 U.S. 113 (1973) 23
Roper v. Simmons,
543 U.S. 551 (2005) 29, 30, 45
Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 32
Smith v. Mullarkey,
67 Fed.Appx. 535 (10th Cir. Jun. 11, 2003) 15, 16

CASE **PAGE**

Smith v. United States Court of Appeals,
for the Tenth Circuit,
484 F.3d 1281 (10th Cir. 2007) 22, 23, 49
Speiser v. Randall, 357 U.S. 513 (1958) 47
Stanford v. Kentucky, 492 U.S. 361 (1989) 29
State Farm Fire & Cas. Co. v. Tashire,
386 U.S. 523 (1967) 27
State Oil Co. v. Khan, 522 U. S. 3 (1997) 45
The Nereide, 13 U.S. 388 (1815) 31
The Paqueete Habana, 175 U.S. 677 (1900) . . 31
Weinberger v. Rossi, 456 U.S. 25, 32 (1982) . . . 30
Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998) . . 37
United States v. Kaczynski,
262 F.3d 1034, (9th Cir. 2001) 37

DISTRICT COURT CASES

Automated Lending, Inc. v. Ransom,
No. 05-cv-02487-REB-MEH
(D.Colo. Nov. 30, 2006) 39
Baldauf v. Garoutte,
No. 03-RB-01104 (D.Colo. Jul. 20, 2006) . 39
Baldauf v. Hyatt,
No. 01-cv-01315-REB-CBS
(D.Colo. Feb. 08, 2006) 39
Calvert v. Safranek,
No. 05-cv-001713-REB-PAC
(D.Colo. Jan. 30, 2006) 39

CASE **PAGE**

Gallegos v. ACE Express - Coach USA,
No. 06-cv-00408-REB-BNB
(D.Colo. Jan. 19, 2007) 39
Harrington v. Wilson,
No. 05-cv-01858-EWN-MJW
(D.Colo. Sept. 21, 2005) 39
Lawton v. Center Stock Company, LLC,
No. 06-cv-01125-REB-MEH
(D.Colo. Jan. 19, 2006) 39
Martin v. Directors Guild of America,
No. 06-cv-00609-REB-MJW
(D.Colo. May 16, 2006) 39
Shell v. Devries,
No. 06-cv-00318-REB-BNB
(D.Colo. Jan. 30, 2007) 39
Signer v. Pimkova,
No. 05-cv-02039-REB-MJW
(D.Colo. Nov. 30, 2006) 39
Steiner v. Concentra, Inc.,
No. 03-N-2293
(Colo. Dist. Ct. Aug. 6, 2004) 17, 18
Stetzel v. Attorney General of the State
of Colorado, 04-cv-01531-REB-BNB
(D.Colo. Jan. 3, 2006) 39
Williams v. United States Forest Service,
No. 05-cv-01277-REB-BNB
(D.Colo. Jun. 27, 2006) 39

STATUTES AND OTHER AUTHORITIES

	PAGE
10th Cir. R. 36	22
18 U.S.C. § 241	20
18 U.S.C. § 242	20
28 U.S.C. § 453	44, 48
28 U.S.C. § 636(b)	38
28 U.S.C. § 1654	20
42 U.S.C. § 1983	27,28
International Covenant on Civil and Political Rights, 999 U.N.T.S. 171	31
Mass. Declaration of Rights, art. 29	13
U.S. Const. art. VI, cl. 2.	28

Bacon, Francis, Essays (On Judicature) (1625)	24
Blau, Reuben, "No Justice In Judicial Salaries," The Chief-Leader, Jan. 12, 2007	42
Bork, Robert, "Our Judicial Oligarchy," First Things 67 (Nov. 1996)	28
1 Blackstone, Commentaries (1765)	43
Burkman, Oliver, "Orgies Are the Way To Ease Social Tensions, Claims US Judge," The Guardian, Oct. 1, 2004	43
Cardona, Felisa, "Feds Grill Nacchio Judge's Ex-Wife," Denver Post, Aug. 14, 2007	41
1 E. Coke, Institutes of the Laws of England (1642)	43
138 Cong. Rec. S4,783	31
The Federalist No. 78	43

PAGE

Patrick Henry, 3 Elliot, Debates (Virginia Convention, June 5, 1788) 51

Jefferson, Thomas,
-- Letter (to William C. Jarvis), 1820 43
-- Letter (to (to Edward Livingston), 1825 24

Kozinski, Alex, Letter (to Judge Samuel A. Alito, Jr), Jan. 16, 2004 34

John Leo, "The End of Argument," USNews.com, Apr. 25, 2005 51

Llewellyn, Karl, The Common Law Tradition: Deciding Appeals (1960) 48

Mauro, Tony, "Roberts Dips Toe into Cert Pool," Legal Times, Oct. 21, 2005 40

Miner, Roger J., Judicial Ethics In the Twenty-First Century: Tracing the Trends, 32 Hofstra L. Rev. 1107 (2004) 42

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Rotunda, Ronald A., "The Courts Need This Watchdog," Washington Post, Dec. 21, 2006 22
Wojtyla, Karol (a.k.a., Pope John Paul II), Evangelium Vitae, Encyclical Letter on the Value and Inviolability of Human Life, March 25, 1995 51
United States Dept. of Justice, Number of Federal Tort Trials Fell By Almost 80 Percent From 1985 Through 2003, Aug. 17, 2005 19

WEB RESOURCES/WEBZINES

Bazelon, Emily, "The Big Kozinski," Legal Affairs, Jan-Feb. 2004 . . . . . 36, 37
Evans, Will, "Money Trails Lead to Bush Judges," Salon.com, Oct. 31, 2006 41
Federalist Society 2007 Student Symposium 33
"Fighting Tyranny, Spreading Freedom," Townhall.com, Apr. 8, 2005 51
Grieve, T., "Ann Coulter: Someone Should Poison Justice Stevens," Salon.com, Jan. 27, 2006 50
"Judge: Too Drunk To Remember Night At Strip Club," TampaBay's10.com, Aug. 10, 2007 41
Mann, Philip, "Citation To "Non-Precedential" Opinions To Be Permitted. It's About Time," IP Litigation Blog, Apr. 14, 2006 35
Olbermann, Keith "The Death Of Habeas Corpus," MSNBC.com, Oct. 11, 2006 12

OPINIONS BELOW

A copy of the published opinion of the Court of Appeals for the Tenth Circuit, *Smith v. United States Court of Appeals, for the Tenth Circuit, 484 F.3d 1281 (10th Cir. 2007)*, is included in the Appendix to this Petition at p. 54. Copies of memorandum orders entered in the United States District Court for the District of Colorado on October 15, 2004 are at p. 71.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §1254(1), this Court has jurisdiction to review the decisions of the Court of Appeals for the Tenth Circuit in this matter. Petitioner timely filed a petition for rehearing en banc, which was denied on July 11, 2007; hence, this petition is considered as timely filed when mailed on or before October 10, 2007.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1, of the United States Constitution provides in relevant part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 2, of the United States Constitution provides in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ...."

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides in relevant part: "... nor shall any person be ... deprived of life, liberty, or property, without due process of law; ...."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL AND STATE STATUTES INVOLVED

18 U.S.C. § 242 states, in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both...

42 U.S.C. § 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

STATEMENT OF THE CASE

A century ago, Justice Moody described the right of access to the courts as "the right conservative of all other rights" and "the alternative of force." *Chambers v. Baltimore & O. R. Co., 207 U.S. 142, 148 (1907).* Without it, as television commentator Keith Olbermann demonstrates, the "Bill of Rights" becomes the "Bill of Right." *Keith Olbermann, 'The Death Of Habeas Corpus," MSNBC.com, Oct. 11, 2006.*

"The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury." *Marbury v. Madison, 5 U.S. 137, 163 (1804).* Conversely, if our courts are free to refuse to hear your legitimate grievances, our government can do anything it wants; you don't have any "rights" at all. As such, it is not without cause that Chief Justice Marshall described a judge's willful refusal to take jurisdiction over a case he had a duty to hear as **"treason to the constitution."** *Cohens v. Virginia, 19 U.S. 264, 404 (1821) (emphasis supplied)*

Our courts have a concomitant obligation to provide every person under their jurisdiction with equal protection of the law. As John Adams observed in the Massachusetts Declaration of Rights, "[i]t is essential to the preservation of the rights of every individual, his life, liberty, property and character, that **there be an impartial interpretation of the laws, and administration of justice.**" *Mass. Declaration of Rights, art. 29 (emphasis added).*

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury, 5 U.S. at 177-78.* This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991); Cohens, 19 U.S. at 399.* The Tenth Circuit states: "We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith, 10 F.3d 723, 734 (10th Cir. 1993).* This is the law -- but is there any meaningful way for a citizen aggrieved by deliberate judicial lawlessness to enforce it?

The conceptual question raised in this appeal is whether a litigant has an enforceable due process right to have a claim decided in accordance with established precedent of the Circuit. If the answer is "no," the entire edifice of

American law collapses; every opinion this Court agonizes over today becomes scarcely more than friendly advice rendered by "Dear Abby." as we will have replaced the rule of law with an arbitrary and despotic rule of judges.

The technical questions raised are whether (1) inferior court judges have the authority under Article III to issue opinions in conflict with the binding precedent of the Circuit and (2) the doctrine of absolute judicial immunity has been eradicated by sea changes in both the common law and jus cogens international law.

SUMMARY OF PERTINENT FACTS

As the Tenth Circuit appears to have deliberately elided one of the issues presented in the appeal -- whether a victim of willful judicial misconduct at the appellate level is entitled to an effective remedy -- a recitation of salient facts both precipitating and surrounding this lawsuit is in order.

Procedural History

On or about November 7, 2000, Petitioner Ken Smith, a Colorado resident and law school graduate, filed an action in federal district court challenging the facial constitutionality of that state's bar admission statute. His complaint was summarily dismissed on motion in a threadbare

opinion, on the grounds that the court did not have subject-matter jurisdiction over the matter.

Smith timely appealed to the Tenth Circuit, quoting this Court's *Feldman* decision in direct refutation of the District Court's claim:

> In one of the decisions for which the *Rooker-Feldman* doctrine is named, the Supreme Court asserted that "[t]o the extent that [plaintiffs] Hickey and Feldman mounted a general challenge to the constitutionality of [the District of Columbia's bar admission statute], however, the District Court did have subject matter jurisdiction over their complaints." *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-83 (1983).* Smith has mounted facial challenges to Colorado's bar admission statute. As such, he is entitled to have them heard in federal court. It doesn't get any more complicated than that.

Brief for Appellant at 15, Smith v. Mullarkey, 67 Fed.Appx. 535 (10th Cir. Jun. 11, 2003) (No. 02-1481).

In its unpublished opinion affirming the court below, the Tenth Circuit admitted that it knew the nature of the suit:

> [Smith] filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights. **Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...**

Smith v. Mullarkey, slip op. at 4 (emphasis added).

It is but a simple syllogism: If condition X (an applicant challenges the facial constitutionality of a bar admission rule) is true, then Y (a federal district court must hear his claim, by virtue of *Feldman*). Condition X is true (a fact the Tenth Circuit panel openly admitted in the highlighted text). Therefore, Y (a federal district court must hear that claim). In defiance of this simple and irrefutable logic, the Tenth Circuit wrote designer law, applicable to one litigant and one litigant only, summarily denying Smith the right to challenge the constitutionality of a statute directly and uniquely affecting him as a bar applicant.

Now, contrast that with the Tenth Circuit's decision in *Roe v. Ogden, 253 F.3d 1225 (10th Cir. 2001)*, relied upon in the appeal. As they pertained to standing, the salient facts were identical: a group of potential bar applicants were challenging Colorado's practice of requiring bar applicants to submit to psychiatric examinations at the State's discretion. The only difference was

that the plaintiffs in that suit were represented by two of the most high-powered law firms in Colorado: Holland and Hart and Brownstein, Hyatt, and Farber. *Civil Docket, Roe v. Ogden, supra. (obtained via PACER, visited Sept. 26, 2006; copy on file).* They got their day in court, even though there wasn't any precedent ... while Smith was denied a day in court, despite the fact that *Roe v. Ogden* stood as binding precedent. *Cf., In re Smith, 10 F.3d 723 (10th Cir. 1993).*

A Criminal Conspiracy Unmasked....

Subsequent investigation revealed that courts of the District of Colorado have engaged in systematic discrimination against *pro se* litigants -- whose only crime is that they cannot afford representation -- effectively denying access to the courts through fraud, deceit, the fabrication of facts and irregular interpretation of the law. Stunningly, Magistrate O. Edward Schlatter put this remarkable confession into writing: "Since I've been here, in 12 years nobody who does not have a lawyer has ever proceeded to a trial and won. And that's out of 600 cases filed per year." *Order Denying Pl's Mot. To Recuse, Steiner v. Concentra, Inc., No. 03-N-2293 (Colo. Dist. Ct. Aug. 6, 2004) at 3.*

The recipient of Magistrate Schlatter's remarkable confession, Ivy League-educated physician Elizabeth Steiner, was understandably

aghast. She accurately perceived that he had "cooked the books" to her detriment, and sought his recusal. She recognized the ugly ramifications of his confession, and 'did the math.' Schlatter continued:

> She learned from me that I have been a magistrate judge for 12 years. I mentioned "600 cases per year," so she concluded that I handled that number of cases -- each year, every year -- for a total number of 7,200 cases over the span of my career. She figures that if approximately 60 per cent of those cases are cases that were filed by pro se litigants, I have been responsible for 4,320 pro se cases. Plaintiff learned from my remarks that none of the pro se cases survived to a jury trial where the pro se litigant prevailed.

Id.

Her math can be refined somewhat. Roughly 10% of the District's business is comprised of non-prisoner pro se cases. That translates to roughly 3,500 pro se civil cases filed during Magistrate Schlatter's career -- his "600 case" figure may well be accurate, if one counts pro se prisoner petitions -- and one is hard-pressed to find a single civil case brought by a pro se litigant that even made it to trial.

According to the Department of Justice, the percentage of tort cases concluded by trial in U.S. district courts has also "declined from 10 percent in the early 1970s to 2 percent in 2003." *Number of Federal Tort Trials Fell By Almost 80 Percent From 1985 Through 2003, United States Dept. of Justice, Aug. 17, 2005, at 1.* As the plaintiffs prevailed in 48% of tort cases during the study period, *id.*, and the overwhelming majority of pro se actions are in tort, the odds of this outcome occurring by random chance are $(1 - (.02*.52))^{3500}$, or about one in two quadrillion. Moreover, as availability of alternative dispute resolution was cited as a contributing factor to the decline of jury trials, *id.*, and this beneficial feature of the judicial system is unavailable to pro se litigants, the chances of a case going to trial would be far higher; in which case, the odds of no successful outcomes occurring would approach a googol to one.

Numerous instances have been identified where federal judges in the District have apparently discriminated against pro se litigants, including the skirting of proper procedures and outright fabrication of facts and flagrant misapplication of the law, to the ultimate effect of denying them their day in court.

This state of affairs is pregnant with constitutional significance. 18 U.S.C. § 242 states, in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, ... shall be fined under this title or imprisoned not more than one year, or both...

As civil litigants have a long-standing federal right to self-representation under 28 U.S.C. § 1654, any judge who deprives a litigant of that right has committed a federal crime. Similarly, as it has been long established that litigants have a constitutional right to equal protection of the law, *see, e.g., Bolling v. Sharpe, 347 U.S. 497, 499 (1954)*, disparate treatment based only on the fact that the billionaire litigant can afford the services of Baker and Botts, and the man of modest means must proceed without a lawyer, is so unjustifiable as to be violative of due process. Accordingly, if the rule of law is to mean anything -- bitter experience has taught us that it surely does not -- systematic discrimination against pro se litigants is a federal crime, and a conspiracy to discriminate against pro se litigants is a federal felony punishable by up to ten years in prison. *18 U.S.C. § 241.*

....And the Tenth Circuit's Complicity

There may not be a bar for judicial conduct on the planet set lower than the one established by the Tenth Circuit. Professor Ronald Rotunda observes:

> [Judge] John Kane (who gave me permission to quote his e-mail), wrote, "I've been a district judge for 29 years and think the federal judicial house has brought this legislation on itself." He sat on the 10th Circuit Judicial Council when the first complaint about a judge came up for consideration: **A district judge was trying to coerce counsel into establishing a library on product liability cases in honor of the judge**.
>
> Judge Kane's e-mail is worth quoting at length. He voted for discipline. The vote was 3 to 3, "and so the Chief Judge voted against sustaining the complaint because it was the first such complaint and he thought a close vote was too slender a reed upon which to proceed. As we were leaving the meeting, one of the judges who had voted to dismiss collared me and said, 'John, think about it. The next time it could be you or me. We've got to stick together.' "

Ronald D. Rotunda, 'The Courts Need This Watchdog," Washington Post, *Dec. 21, 2006 at A-29 (emphasis added).*

This fact bears repeating: Judges within the Tenth Circuit saw nothing wrong with **a fellow judge soliciting a bribe!** Men of this caliber, stripped of all semblance of a conscience, have no qualms whatever about committing felonies on an industrial scale.

The Second Lawsuit

As the Tenth Circuit decision openly defied not only this Court's decision in *Feldman*, but other precedent binding in the Circuit, *Roe v. Ogden, supra.*, and did so in so-called unpublished opinion pursuant to 10th Cir. R. 36, Smith filed a second lawsuit, challenging the practice whereby judges can write "designer law," applicable to one and only one set of litigants, in complete and utter disregard of the doctrine of *stare decisis*, in both federal and Colorado courts. Smith also sued the federal judges in tort on a *Bivens* theory, claiming that the antiquated doctrine of judicial immunity violated peremptory norms of international law. Ignoring the *Bivens* claim, a panel of the Tenth Circuit affirmed the District Court's dismissal on the grounds of standing, once again ignoring binding law of the Circuit. *Smith v. United States Court of Appeals, for the Tenth Circuit, 484 F.3d 1281 (10th Cir. 2007).*

The controlling case in the Tenth Circuit is *Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1994)*. Under *Razatos*, all Smith had to do is allege that (a) he was harmed in the past, and (b) there is a reasonable possibility of injury in the future. *Cf., City of Los Angeles v. Lyons, 481 U.S. 95 (1983); Facio v. Jones, 929 F.2d 541 (10th Cir. 1991)* (highly remote possibility of recurrence defeats standing). Moreover, under the rule announced in *Smith v. Tenth Circuit, supra.*, the window between ripeness (when a clearly erroneous decision is affirmed or issued by an appellate court) and mootness (the grant or denial of a writ of certiorari) is even shorter than the human gestation period -- so short, no lawsuit could ever fit within it. Thus, as the rights violation complained of is "capable of repetition, but evading review," the lower court decision is also in irreconcilable conflict with the alternate standing rule of *Roe v. Wade, 410 U.S. 113 (1973)*.

REASONS WHY THE WRIT SHOULD BE GRANTED

While this dispute is couched in terms of standing and precedent, it strikes at the very foundation of our relationship as citizens to our government. Our Founding Fathers wrote the Bill of Rights, not to protect us from foreign invaders, but to protect us from our own government.

Law exists to restrain the hand of government. Law exists to protect the individual. Simply put, if the door to the courthouse can ever be closed at will, 'law' as we know it ceases to exist. Petitioner seeks to rectify this intolerable state of affairs by asking this Court to consider two utterly unworkable and patently unconstitutional doctrines: the judicial self-grant of absolute immunity, and the de facto court practice of writing designer law applicable to one and only one set of litigants.

Absolute Judicial Immunity

Common-law judges have been illegitimately usurping power ever since there have been common-law judges. Sir Francis Bacon had to remind his colleagues, "Judges ought to remember that their office is jus dicere, and not jus dare; to interpret law, and not to make law, or give law." *Bacon, Essays (On Judicature) (1625).* Thomas Jefferson observed that "One single object... [will merit] the endless gratitude of society: that of restraining the judges from usurping legislation." *Thomas Jefferson, Letter (to Edward Livingston), 1825.* More recently, Justice Scalia lamented that his colleagues are "day by day, case by case, busy designing a Constitution for a country I do not recognize." *Board of County Commissioners v. Umbehr, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).*

A. The Common-Law Argument

Absolute judicial immunity is a doctrine created by judges for judges, predicated on a sophistry even Lewis Carroll would find utterly impenetrable. Professor Abimbola Olowofoyeku of London's Brunel University distills it to essentials:

> You have been injured by the misconduct of a judge. We have to deny you redress. This is necessary because we have to protect your interests by protecting the judges, so that they in turn can protect your interests without fear of apprehension.

Abimbola A. Olowofoyeku, Suing Judges: A Study of Judicial Immunity at 197.

As Canada recently enacted its own bill of rights (the *Canadian Charter of Rights and Freedoms*), the Supreme Court of Canada had reason to address the doctrine of absolute immunity; understandably, they found it irreconcilable with the very concept of rights under law:

> An absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the *Canadian Charter of Rights and Freedoms*. As such, the existence of absolute immunity is a threat to the individual rights

> of citizens who have been wrongly and maliciously prosecuted. While the policy considerations in favour of absolute immunity have some merit, these considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim.

Nelles v. Ontario, *[1989] 2 S.C.R. 170.* In turn, their decision rests on an incorrigible common-law principle predating our existence as a country:

> If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.

Ashby v. White, *[1703] 92 Eng.Rep. 126, 136.*

The American doctrine of judicial immunity is a bastard child born of judicial infidelity, as is evidenced most explicitly by Pierson v. Ray, *386 U.S. 547 (1967).* Therein, the Warren Court jettisoned every canon of judicial interpretation known to our law. First among them is the "plain meaning" rule: the presumption that Congress meant what it

said and said what it meant in the text of the statute. *See, Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (collecting cases spanning two centuries).* Justice Cardozo added that courts may not "pause to consider" whether a better statute might have been written, but are compelled to "take the statute as we find it." *Anderson v. Wilson, 289 U.S. 20, 27 (1933).*

In pertinent part, the ubiquitous Section 1983 is as clear and unambiguous as any statute one could hope to write: "Every person [who does X to Y is liable to Y in tort]." *42 U.S.C. § 1983.* Had Congress intended to exempt state judges from this section, it would have said something to the effect that "This section shall not apply to judges." What's more, as Justice Douglas noted in dissent, the legislative history clearly indicated that Congress intended to impose tort liability on wayward state judges. *Pierson, 386 U.S. at 561-63 (Douglas, J. dissenting).* Finally, Section 1983 is a remedial statute, liberally construed to accomplish the purposes of its enactment, **a rule the Court invoked literally one day earlier** in unanimously deciding *State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (Apr. 10 vs. Apr. 11).*

Chief Justice Warren justified his decision by proclaiming that "The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Pierson, 386 U.S. at 554.* This begs the question of why

Congress would need to make such an indication, as any law made "under the Authority of the United States, shall be the supreme Law of the Land." *U.S. Const. art. VI, cl. 2.* The statute was clear, served a remedial purpose, was consistent with the legislative history, and directly addresses the matter of "bribed judges" oppresssing Negroes and their Republican allies in the Reconstruction South. *Pierson* was a power-grab, naked and unashamed.

At its essence, all representative government is grounded on common consent. *See, The Anti-Federalist No. 84.* If the King can do whatever he wants to you with total impunity, you do not live under the rule of law but rather, have been reduced to a state of servitude; one to which no American would ever willingly consent. But if our public officials can do anything they want to us with total impunity, we have merely replaced the King with another tyrant. Granting an absolute immunity in tort to judges who in some instances assume plenary control over our lives is to elevate them to the status of tyrants. Thus, we no longer live under the "rule of law" but rather, under the thumb of what Judge Bork called a "judicial oligarchy." *Robert H. Bork, "Our Judicial Oligarchy," First Things 67 (Nov. 1996) at 24.* And this is categorically unacceptable, as this Court has so defiantly proclaimed:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

United States v. Lee, *106 U.S. 196, 220 (1882)*.

B. Jus Cogens International Law Argument

Absolute judicial immunity is a common-law doctrine; as such, it is vulnerable to sea changes in the common law. Moreover, this Court has stated that it will abandon a line of precedent if it becomes unworkable. *Planned Parenthood of Southeastern Pa. v. Casey*, *505 U.S. 833, 854 (1992)*. However, this Court has consistently taken international law into account in its decisions, and has dramatically changed its jurisprudential course on far smaller provocation. *Cf.*, *Roper v. Simmons*, *543 U.S. 551 (2005)* with *Stanford v. Kentucky*, *492 U.S. 361 (1989)* (reversal evidently based on developments in jus cogens international law).

The only way *Roper* can be explained is that the Court recognized a long-standing obligation to interpret domestic law in a manner consistent with peremptory norms of international law. "It has been a maxim of statutory construction since the decision in *Murray v. the Charming Betsy*, *[6 U.S. 64, 118] (1804)* that 'an act of congress ought

never to be construed to violate the law of nations, if any other possible construction remains.'" Weinberger v. Rossi, 456 U.S. 25, 32 (1982). The *Roper* Court, noting the consequences of sanctioning a practice so barbaric, even Saudi Arabia won't engage in it, Roper, *slip op. at* 23, chose to accede to the will of the community of nations, interpreting the Eighth Amendment as outlawing the execution of juvenile offenders. By the same logic, recent developments in international law have eviscerated the notion that the State and/or its agents are not liable for the willful deprivation of the rights of individual citizens.

Ratified by our country in 1992, the International Covenant on Civil and Political Rights ("the ICCPR") is a de facto international Bill of Rights, regulating the relationship of a government to its citizens. In pertinent part, signatory States are obligated

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, **notwithstanding that the violation has been committed by persons acting in an official capacity.**
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial,

> administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

International Covenant on Civil and Political Rights ("the ICCPR"), *cl. 3, 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (emphasis added)*. Human rights protected by the ICCPR include access to the courts (art. 14) and equal protection of the law (art. 26). *Id.*

During the ratification debate, Senator Daniel Patrick Moynihan (D-NY) observed that, even though the ICCPR is not self-executing, "these will become binding international obligations of the United States." *138 Cong. Rec. S4,783 (statement of Sen. Moynihan)*. It is therefore obvious from the legislative history that Congress intended the ICCPR to be more than a shameless exercise in political masturbation. This, in turn, begs the question of the proper weight this Court must give to its "effective remedy" requirement.

"International law is a part of our law," *The Paqueete Habana, 175 U.S. 677, 700 (1900)*, and has been an integral part of our law since the dawn of the Republic. *E.g., Pennington v. Coxe, 6 U.S. 33 (1804)*. This Court "is bound by the law of nations which is a part of the law of the land." *The Nereide, 13 U.S. 388, 423 (1815)*. In light of this

long, unbroken string of precedent, it "would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." *Sosa v. Alvarez Machain, 542 U.S. 692 (2004), slip op. at 36.*

The rule that the State is primarily liable for injuries to the constitutional rights of its citizens has attained jus cogens status as evidenced not only by the ICCPR, but a long strand of Commonwealth (beginning with *Maharaj v Attorney-General of Trinidad & Tobago (No. 2) [1979] AC 385)* and recent European Union (*Case C-224/01, Kobler v Austrian Republic [2003] 3 CMLR 28*) precedent. Importantly, these cases hold that it is a claim in public law, as opposed to one sounding in tort, along the line of reasoning offered in *Carey v. Piphus, 435 U.S. 247 (1978)* (procedural due process violation a separate and distinct injury of constitutional magnitude). Some jurisdictions allow for concurrent liability (e.g., Italy, Spain); others hold that the State is liable alone (e.g., France, Poland). *Olowofoyeku, Suing Judges at 158.*

As the European Union and Commonwealth recognize a justly aggrieved citizen's right to an effective remedy, and over a hundred countries (including Benin, Djibouti, Paraguay and Senegal) are signatories to the ICCPR's First Optional Protocol (authorizing the United Nations' Human

Rights Committee to issue advisory judgments, which have resulted in compensation being paid to complainants whose rights were violated), which is intended to achieve the same end, it can fairly be said that it has attained the status of jus cogens international law.

C. Appellate Review Is No Longer an Effective Remedy

There was a day, not long ago, when appellate courts could be counted on to perform a competent review of decisions brought to their attention. Unfortunately, most modern appellate judges are too busy writing paeans to themselves and law review articles, teaching classes, and/or engorging themselves on the rubber-chicken circuit, *e.g., Federalist Society 2007 Student Symposium (ironically, entitled "Law and Morality), moderated by Judge Timothy Tymkovich, at http://www.law.northwestern.edu/federalist/-symposium/program.asp,* to be bothered with doing the task they are paid quite handsomely to do. As a result, the work product of these bodies is so uniformly poor that we would perhaps be better served by farming the work out to India.

Appellate courts perform no meaningful oversight of most lower court decisions in even the best of times; unfortunately, the sloth appear evenly distributed throughout the Circuits. The only time a judge even considers an appeal not selected for publication is in a judicial confer-

ence, where judges spend more time bragging about their golf game than on individual appeals. The leading proponent of unpublished opinions, Judge Alex Kozinski of the Ninth Circuit, openly admitted that panels in his circuit may issue 150 rulings per three-day session, *Alex Kozinski, Letter (to Judge Samuel A. Alito, Jr.), Jan. 16, 2004 at 5 (copy on file)* -- that's less than ten minutes per decision! But even they are shameful slackers compared to the late Judge Arnold of *Anastasoff* fame, who confessed in a speech at Drake University that he participated in a two-hour conference deciding fifty appeals. *Perfunctory Justice; Overloaded Federal Judges Increasingly Are Resorting to One-Word Rulings,"* Des Moines Register, *March 26, 1999, at 12.* Every judge is aware of this shocking state of affairs, and some are even willing to admit it in open court. Professor Sarah Ricks uncovered this remarkable exchange in a trial transcript:

> THE COURT: At a conference of the Third Circuit, the Court of Appeals defended their unpublished opinions on the ground that they're not well reasoned, they don't give them much thought. So it's hard to say that that's a well-reasoned opinion that has any precedential value.
> MR. WINEBRAKE: Well, we concede—
> THE COURT: It's instructive on what they'll do without much thought.

Sarah E. Ricks, The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit, 81 Wash. L. Rev. 217, 269 (2006).

At the end of the day, the typical unpublished appellate opinion is more toxic than a Chinese Barbie doll. Judge Kozinski famously described them as "inedible sausage," unfit for human consumption -- which begs the question attorney Philip Mann asks:

> In [Judge Kozinzki's] words, "When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway." True. But the real problem lies not with the committee but with the faulty sausage itself. If future litigants shouldn't have to consume the "sausage" of an ill-considered decision, why should the parties to that particular case have to eat it either?

Philip Mann, "Citation To "Non-Precedential" Opinions To Be Permitted. It's About Time," IP Litigation Blog, Apr. 14, 2006, available at http://www.iplitigationblog.com (visited Dec. 31, 2006).

One obvious canard should be dismissed: The problem here is not one of volume. Truth be told, federal appellate judges tend to see their opinions as monuments to themselves, with Judge Kozinski as one of the more flagrant offenders. Emily Bazelon reports that he is "one of the best stylists on the bench, routinely working through 50 or more drafts. 'He would often ask, 'Does it sing?'" *Emily Bazelon, The Big Kozinski, Legal Affairs, Jan-Feb. 2004.* Bear in mind that this is the very same Judge Kozinski who admitted that panels of his Circuit spend roughly ten minutes on appeals not selected for publication, and claims that the crushing appellate workload makes non-publication a necessity.

Now, it would seem that if Judge Kozinski only worked through three or four drafts of each opinion, he could give every appeal the in-depth consideration litigants have a right to expect. There can be no justification for a judge writing a Shakespearean sonnet to justify a decision, *e.g., Busch v. Busch, 773 A.2d 1274 (Pa.Super. 1999)* (Judge Eakin's opinion was actually put into verse), while willfully ignoring a dozen other appeals brought to his or her attention. This practice visits grave injustice upon those children of a lesser god, unable to curry the judges' rarefied favor. Judge Murnaghan of the Fourth Circuit admits that

> it is well known that judges may put considerably less effort into opinions that they do not intend to publish. **Because these opinions will not be binding precedent in any court, a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law.**

Wilson v. Layne, 141 F.3d 111, 124 n.6 (4th Cir. 1998) (Murnaghan, J., dissenting) (emphasis added).

Judge Kozinski was not hired to produce literary masterpieces as enduring monuments to his ego or fodder for legal casebooks, *Bazelon, supra.* (he admits to writing opinions "precisely for the purpose of getting into" a casebook), but rather, to adjudicate disputes. And while the elite few who got his legal Rolls Royces may delight in his craftsmanship, the vast majority, saddled with his judicial Yugos, have cause to be livid.[1]

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[1] This is especially true in light of the fact that the very same Judge Kozinski, who while pontificating for the press in the Unabomber case, suggested that there is "something worse than being tried and punished for one's crimes, and that is **being treated by our legal system as less than human.**" *United States v. Kaczynski, 262 F.3d 1034, 1035 (9th Cir. 2001) (Kozinski, J., dissenting from denial of petition for reh'g en banc; emphasis added).*

B. The Breakdown Is System-Wide

This decline in the quality of American jurisprudence is not limited to the product of our appellate courts; indeed, it is not only possible but not uncommon for a complaint to go completely through the federal system without ever having been reviewed by an Article III judge.

District court judges delegate tasks to magistrate judges under 28 U.S.C. § 636(b) and F.R.Civ.P. 72; pursuant to that authority, magistrates in the District of Colorado routinely issue recommendations that a pro se litigant's complaint be summarily dismissed. The district judge is supposed to perform a *de novo* review of the recommendation, upon objection by the party affected by the proposed dismissal, F.R.Civ.P. 72(b), but judges in the District of Colorado rarely bother. All the district judge in this case, Judge Robert Blackburn, does is issue a boiler-plate order *claiming* he has reviewed the file, never even reciting a single fact, discussing a single objection, or offering any credible evidence that he has actually performed the required review, as a review of all pertinent dismissals published on

Versuslaw for a thirteen-month period establishes.[2] And he is not alone. In one incident, Chief Judge Edward Nottingham dismissed a lawsuit **before** the pro se litigant was required to file his objections. *Harrington v. Wilson, No. 05-cv-01858-EWN-MJW (D.Colo. Sept. 21, 2005).*

When the cases are appealed, the appeals are promptly shunted to an office pool of fresh-faced kids straight out of law school, who effectively decide them. Except for the precious few cases selected for publication, appellate judges never examine the record or even peruse the briefs; all they get is a one-page summary,

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[2] *Shell v. Devries, No. 06-cv-00318-REB-BNB (D.Colo. Jan. 30, 2007); Gallegos v. ACE Express - Coach USA, No. 06-cv-00408-REB-BNB (D.Colo. Jan. 19, 2007); Automated Lending, Inc. v. Ransom, No. 05-cv-02487-REB-MEH (D.Colo. Nov. 30, 2006); Signer v. Pimkova, No. 05-cv-02039-REB-MJW (D.Colo. Nov. 30, 2006); Baldauf v. Garoutte, No. 03-RB-01104 (D.Colo. Jul. 20, 2006); Williams v. United States Forest Service, No. 05-cv-01277-REB-BNB (D.Colo. Jun. 27, 2006); Martin v. Directors Guild of America, No. 06-cv-00609-REB-MJW (D.Colo. May 16, 2006); Baldauf v. Hyatt, No. 01-cv-01315-REB-CBS (D.Colo. Feb. 08, 2006); Calvert v. Safranek, No. 05-cv-001713-REB-PAC (D.Colo. Jan. 30, 2006); Lawton v. Center Stock Company, LLC, No. 06-cv-01125-REB-MEH (D.Colo. Jan. 19, 2006); Stetzel v. Attorney General of the State of Colorado, No. 04-cv-01531-REB-BNB (D.Colo. Jan. 3, 2006) (all Versuslaw).* The analysis was performed in connection with an ethics complaint filed against Judge Blackburn with the Judicial Council of the Tenth Circuit, covering the period from Jan. 1, 2006 through Jan. 30, 2007.

which they might or might not bother to read before holding a two-hour session deciding a batch of appeals. To assert that the appellate panel actually decided the appeal is to place form over substance.

By all accounts, the situation in this Court is no better. Petitions like this are presumably read by two law clerks: one working for Justice Stevens, and another from the "cert pool." *Tony Mauro, "Roberts Dips Toe Into Cert Pool,"* Legal Times, *Oct. 21, 2005.* In effect, the supposed review of last resort is decided by a kid barely out of law school, as opposed to a seasoned Article III judge -- a situation Chief Justice Roberts himself found "a little disquieting." *Id.* As such, a typical complaint can sail through the entire federal court system without ever being seen by an actual judge.

D. Every Litigant Is Affected

This deplorable state of affairs is not a particularly well-kept secret. Magistrates and district court judges know they can play fast and loose with the law because appellate courts probably won't notice -- and even if those courts do notice, they are for the most part disinclined to call them on it. Appellate courts know that this Court is not in the business of error correction, and they can get away with almost anything in an unpublished opinion. In effect, the average litigant is left entirely at the martini-besotted caprice of men

like Judge Edward Nottingham, who admitted under oath to having become so blind, stinking drunk in a strip-bar that he couldn't remember how he spent $3,000, *"Judge: Too Drunk To Remember Night At Strip Club," TampaBay's10.com (Aug. 10, 2007)*, and reportedly paid $150 to join what is billed as "the world's largest SEX & SWINGERS personal community" -- where people sporting suggestive pseudonyms like "BobbyBangem" and "secretnymphotoo" literally display their wares for other swingers to examine as a prelude to extramarital encounters.[3]

It is becoming increasingly evident to the public at large that judicial sinecures are essentially bought on E-bay by fourth-rate political hacks. Of interest is *Salon*'s recent observation that "The money trail leading from Bush judges to influential politicians runs particularly deep through the political battleground states of Ohio and Pennsylvania." *Will Evans, "Money Trails Lead*

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[3] Felisa Cardona, "Feds Grill Nacchio Judge's Ex-Wife," *Denver Post*, Aug. 14, 2007 ("When I asked about the dating service, he turned around in his chambers, and he hit his computer and he told me all about the dating service: it was a porn site," Jaeger testified...."). The website in question is http://adultfriendfinder.com (names were taken from PDF of page captured on Sep. 1, 2007; emphasis in original).

to Bush Judges," Salon.com, *Oct. 31, 2006.* District Judge John E. Jones of Pennsylvania was noted for lavishing campaign contributions on important politicos, even after being interviewed for his position. *"Money Trails to the Federal Bench,"* Center for Investigative Reporting, *Oct. 31, 2006, at 51-2.* If judicial compensation is so penurious as to precipitate the "constitutional crisis" Chief Justice Roberts alleged, *e.g., Reuben Blau, "No Justice In Judicial Salaries,"* The Chief-Leader, *Jan. 12, 2007,* it beggars the imagination that anyone would be trying to buy his way onto the bench. Still, it is worth noting that even Justice Roberts concedes that the quality of our judiciary has declined grievously. *Id.*

Our judiciary is in decay, if not on the verge of collapse, with judges committing felonies on an industrial scale. With unusually brutal candor, Judge Miner of the Second Circuit explains:

> The major cause of the loss of public confidence in the American judiciary, however, is the failure of judges to comply with established professional norms, including rules of conduct specifically prescribed. In brief, it is the unethical conduct of judges, both on and off the bench, that most concerns the citizenry....

Roger J. Miner, Judicial Ethics In the Twenty-First Century: Tracing the Trends, 32 Hofstra L. Rev. 1107, 1108 (2004).

Our forefathers didn't fight a bloody revolution just so they could submit themselves to the arbitrary rule of drunkards and/or sex perverts, *e.g., Oliver Burkman, "Orgies Are the Way To Ease Social Tensions, Claims US Judge," The Guardian, Oct. 1, 2004,* in black robes. The Framers knew, as Thomas Jefferson observed, that judges "are as honest as most men and not more so," *Thomas Jefferson, Letter (to William C. Jarvis), 1820,* and understood the need to place strict controls upon their discretion. Alexander Hamilton explained that to "avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them." *The Federalist No. 78.* Blackstone noted that the judge's duty to follow precedent was derived from the nature of the judicial power itself: a judge is "sworn to determine, not according to his own judgments, but according to the known laws." *1 Blackstone, Commentaries *69 (1765).* A century earlier, Lord Coke proclaimed, "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion." *1 E. Coke, Institutes of the Laws of England 51 (1642).*

Federal judges ascend to the bench pursuant to an agreement, implicit in Article III of the Constitution, that they will only declare what "the law" is and consistently apply it. Furthermore, every judge ascending to the bench swears to "administer justice without respect to persons [...] and "faithfully and impartially discharge" the duties incumbent upon him or her, *28 U.S.C. § 453*, creating a reasonable expectation that every person's grievance will be given full and fair consideration; failure to do so is a self-evident due process violation.

Irregular and/or Unpublished Opinions

This petition would permit this Court to authoritatively answer questions raised in the case that launched a thousand law review articles -- *Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), vacated as moot, 234 F.3d 1054 (8th Cir. 2000)*. Specifically, the late Judge Arnold wrote that Article III does not grant judges the power to arbitrarily depart from established legal principles or settled rules of law, as set forth in the binding precedent of a Circuit. Quoting Justice Story's *Commentaries*, he observed:

> A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide

> for itself, without reference to the settled course of antecedent principles.

Id., slip op. at 11.

Judge Arnold explained why such a doctrine would be so alarming: it replaces the rule of law with a despotic regime of unfettered judicial discretion. But as this is the Supreme Court, the words of Justice Scalia will presumably be given more weight:

> In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary ... ha[s] neither FORCE nor WILL but merely judgment." But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation ...

Roper v. Simmons, 543 U.S. 551 (2005) (Scalia, J., dissenting), slip op. at 1.

It has always been "this Court's prerogative alone to overrule one of its precedents." *State Oil*

Co. v. Khan, 522 U. S. 3, 20 (1997), but see, Roper, supra. (Court silently approves state-court decision that blatantly rejected controlling precedent). If precedent is to have any value, it will not do for this Court to issue an opinion in 1983 and the Tenth Circuit to issue an opinion relying on it in 2001, only to have a district court judge ignore both of them in 2002, and to have a panel of that same Circuit approve the decision so blatantly rejecting that controlling precedent. This is why Justice Story observed that unprincipled departures from the doctrine of stare decisis are "justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority." Anastasoff, slip op. at 11.

The Tenth Circuit misconstrued the problem, limiting the question to one of whether a litigant is entitled to a published opinion. Clearly, it matters not a whit whether an appellate opinion is published or unpublished, as long as later courts are free to disregard them. What really matters here is our ability as citizens to take this Court's solemn pronouncements 'to the bank' -- both figuratively and literally.

The virtue to society of the rule of *stare decisis* goes far beyond the temporal assurance that individual litigants were treated fairly. The rule of law thus expressed furnishes "a clear guide for the conduct of individuals, to enable them to plan

their affairs with assurance against untoward surprise," streamlines adjudication by obviating the need to constantly relitigate recurring issues, and bolsters public faith in the judiciary as "a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines*, *398 U.S. 375, 403 (1970)*. Significant uncertainty in application of the law impairs everyone's liberties, for when "one must guess what conduct or utterances may lose him his position, one necessarily will 'steer far wider of the unlawful zone,'" *Speiser v. Randall*, *357 U.S. 513, 526 (1958)*, for "the value of a sword of Damocles is that it hangs -- not that it drops." *Arnett v. Kennedy*, *416 U.S. 134, 231 (1974) (Marshall, J., dissenting)*. And, as Justice O'Connor so famously wrote, "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood*, *505 U.S. at 844*.

Americans make critical economic decisions on a daily basis, under a reasonable presumption that pronouncements of this Court are authoritative statements of 'the law of the land' that we can rely on. The practice of issuing unpublished opinions destroys this reasonable reliance, and is corrosive -- if not utterly fatal -- to the rule of law. This Court has neglected this problem for far too long.

Our Judges Lie To Achieve The Desired Outcome

In one of his timeless tomes, Professor Karl Llewellyn observed that judges often

> manhandl[e] ... the facts of the pending case, or of the precedent, so as to make it falsely appear that the case in hand falls under a rule which in fact it does not fit, or especially that it falls outside of a rule which would lead in the instant case to a conclusion the court cannot stomach.

Karl Llewellyn, The Common Law Tradition: Deciding Appeals (1960) at 133.

When judges "cook the books," the stench is unmistakable. As Llewellyn remarked, "[s]uch action leaves the particular point moderately clear: the court has wanted [the result] badly enough to lie to get it." *Id. at 135.*

While our judges all swear a solemn oath to "administer justice without respect to persons," *28 U.S.C. § 453,* in the real-world Animal Farm our court system has become, some animals are more equal than others. It is almost predictable that appellate judges would display favoritism toward a sitting Senator, which is what the evidence shows here:

> There are vague and conclusory references in Mr. Smith's briefing to an

> asserted tort liability of defendant [United States Senator Ken] Salazar, former Colorado Attorney General. Neither these references nor the underlying pleadings in the case remotely establish the existence of a cognizable claim.

Smith v. Tenth Circuit, slip op. at 14 and fn. 5.

The path to tort liability for Sen. Salazar is a clear and well-trodden one. A supervisor may be held liable for the unconstitutional acts of an inferior upon proof of actual knowledge of or acquiescence in the constitutional deprivations alleged. *Holland v. Harrington, 268 F.3d 1179, 1187 (10th Cir. 2001); Green v. Branson, 108 F.3d 1296, 1302 (10th Cir. 1997).* Here, the constitutional violation was the denial of Smith's right to have his facial challenge to the state's bar admission statute heard in a federal court, an act facilitated by Assistant Attorney General Friedrick Haines' knowing conduct. Smith alleged that Sen. Salazar's official function was to act in parens patriae for the citizens of Colorado, *Complaint at ¶ 19,* acted "either directly or through his subordinates" to conspire with others with the purpose of sheltering partisan Colorado Supreme Court justices, *Id., ¶ 33,* and acted with recklessness or deliberate indifference toward Smith's constitutional rights." *Id., ¶ 47.* Especially under the standard the Tenth Circuit officially espouses in its published rulings, *Hall v. Bellmon,*

935 F.2d 1106, 1110 (10th Cir. 1991) (considerable leeway granted to pro se litigants in pleading), it is more than sufficient to properly state a cause of action. But federal judges lie -- and openly commit felonies -- because they know they can.

The third question presented here is whether a state attorney general -- who is sworn to uphold and defend the Constitution, and has only been granted absolute immunity with respect to his actions in the context of a criminal prosecution -- is immune from civil suit for aiding and abetting a criminal act committed by his clients. However, this is but an instance of plain judicial error.

CONCLUSION

In his extensive de-rationalization of the specious arguments offered to justify the doctrine of absolute judicial immunity, Professor Olowofokeyu concluded that "the best explanation for the continued existence of judicial immunity is judicial self-protection." *Olowofokeyu, at 200.* Ironically, in light of Bart Ross' massacre of the Lefkow family and attorney Ann Coulter's public recommendation that someone put rat poison in a certain Justice's crème brulèe, *e.g., T. Grieve, "Ann Coulter: Someone Should Poison Justice Stevens," Salon.com, Jan. 27, 2006,* judicial self-preservation may be the strongest justification for abandonment of this doctrine. Justice Thomas

perceptively suggested that our judiciary is running on "borrowed time," *John Leo, "The End of Argument," USNews.com, Apr. 25, 2005,* for self-evident reasons: If you cannot hope to hold government accountable for unlawful actions, or settle legitimate grievances by peaceful means, you will eventually resort to violence. As a radical rabble-rouser put it:

> Human rights cannot be given in the form of concessions. Man is born with them and seeks to realize them in the course of his life. And if they are not realized or experienced, then man rebels. And it cannot be otherwise, because he is a man. His sense of honor expects it.

"Fighting Tyranny, Spreading Freedom," Townhall-.com, Apr. 8, 2005, (quoting Karol Cardinal Wojtyla (a.k.a., Pope John Paul II).

Those stirring words come not from Lenin, Marx, or Che Guevara, but the penultimate prince of peace of our age, Pope John Paul II. Patrick Henry warned that "nothing will preserve [the public liberty] but downright force," *Patrick Henry, 3 Elliot, Debates at 45 (Virginia Convention, June 5, 1788);* His Holiness adds in an encyclical that any violent reaction to such oppression is morally "attributable to the aggressor whose action brought it about." *Karol Wojtyla (a.k.a., Pope John Paul II), Evangelium Vitae, Sec. 55,*

Encyclical Letter on the Value and Inviolability of Human Life, March 25, 1995. In short, if a judge should be so bold as vent his spleen upon a litigant in contravention of law, his victim has the legal and moral right to ventilate that judge's spleen with a .44 Magnum; she would have not only the imprimatur of our Founding Fathers, but the blessing of God as delivered by a future saint.

For these compelling reasons, this Court should grant the writ of certiorari in order to resolve the legal issues of broad significance that this petition presents.

Respectfully submitted this
9th day of October, 2007,

__/s/_____
Kenneth L. Smith, *pro se*
23636 Genesee Village Rd.
Golden, Colorado 80401
Tel: (303) 526-5451

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,434 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d), and that the text is set in the Century family (Century Gothic).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2007.

_/s/_____
Kenneth L. Smith, in propria persona

EXHIBITS

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(No. 04-1468)
KENNETH L. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT; THE JUDICIAL COUNCIL FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT; EDWARD W. NOTTINGHAM, District Judge, in his personal capacity only; HONORABLE MARY BECK BRISCOE, in personal capacity only; HONORABLE STEPHEN H. ANDERSON, in personal capacity only; HONORABLE JAMES E. BARRETT; HONORABLE H. JEFFREY BAYLESS, in personal capacity and in his representative capacity as the chief judge of the District Court, City and County of Denver; KEN SALAZAR, Honorable, in his personal capacity only, and John Does 1-99,

Defendants-Appellees.

(No. 04-1470)
KENNETH L. SMITH,

Plaintiff-Appellant,

v.

MARY J. MULLARKEY; REBECCA LOVE KOURLIS; MICHAEL L. BENDER; GREGORY J. HOBBS, JR.; ALEX J. MARTINEZ; NATHAN B. COATS; NANCY E. RICE, Hons. in their official capacities as Justices of the Colorado Supreme Court,

Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado (D.C. Nos. 04-RB-1222(OES) and 04-RB-1223 (OES))

Submitted on the Briefs:*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases aretherefore ordered submitted without oral

Kenneth L. Smith, *pro se*

John W. Suthers, Attorney General; and Friedrick C. Haines, First Assistant Attorney General, State of Colorado, Denver Colorado, for Defendants-Appellees.

Before **HOLLOWAY**, **SEYMOUR**, and **BALDOCK**, Circuit Judges.

SEYMOUR, Circuit Judge.

Kenneth L. Smith appeals the district court's dismissal of two separate lawsuits stemming from the denial of his application for admission to the Colorado bar. The present litigation focuses on asserted deficiencies he alleges existed in the judicial process provided to him in his previous legal challenges. In particular, Mr. Smith objects to the resolution of cases by non-precedential unpublished decisions, a practice permitted by procedural rules issued and enforced by the Colorado courts and by this circuit.[4] As explained

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argument.

[4] Because the Tenth Circuit Court of Appeals, several circuit judges, and a district judge in the circuit are named defendants in the action challenging this court's

publication practice, plaintiff has moved for recusal of all Tenth Circuitjudges and designation of a hearing panel from another circuit. Given "there are no pertinent, particularized allegations of bias," we apply our general rule that, notwithstanding the inclusion of Tenth Circuit judges in the caption, "neither this court nor this panel . . . is disqualified from hearing and resolving this case." *Switzer v. Coan*, 261 F.3d 985, 987 n.1 (10th Cir. 2001) (brackets, quotation marks and citations omitted). Indeed, it seems peculiarly unfitting for one circuit's procedural rules and practices to be governed by judges from another circuit. Such matters are, of course, subject to the judgment of the Supreme Court, which has wide-ranging authority through both case-specific review and its general supervisory power "to intervene to protect the integrity of the federal system." 32 Am. Jur. 2d *Federal Courts* § 473 (discussing authority regarding Supreme Court's supervisory power).

below, we agree with the district court that neither of the cases under review can properly proceed in federal district court. We therefore affirm.

I

Background

Mr. Smith graduated from law school, passed the state bar examination, and passed the professional ethics examination, all prerequisites to obtaining a license to practice law in Colorado. When he was ordered to submit to a mental status examination by the Board of Law Examiners' Hearing Panel, however, he refused. Primarily because Mr. Smith refused to submit to that examination, the Hearing Panel recommended to the Colorado Supreme Court that his application be denied. After consideration of the record, including Mr. Smith's application, the Hearing Panel's report and recommendation, Mr. Smith's exceptions to that report, and the responses filed by the Board of Law Examiners, the Colorado Supreme Court denied the application for admission to the State Bar. Mr. Smith then filed an action in federal district court challenging the admission process on constitutional grounds. That action was dismissed pursuant to the *Rooker-Feldman* doctrine.[5] On appeal, this court affirmed

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[5] The *Rooker-Feldman* doctrine holds that under 28 U.S.C.

in an unpublished Order and Judgment, see *Smith v. Mullarkey*, No. 02-1481, 2003 WL 21350579 (10th Cir. June 11, 2003), and denied Mr. Smith's request for a rehearing. Mr. Smith unsuccessfully sought a writ of mandamus and/or prohibition from the Supreme Court.

In the meantime, Mr. Smith challenged the bar admission process in state court on state and federal (42 U.S.C. § 1983) grounds. The state trial court summarily dismissed for lack of jurisdiction, citing the state supreme court's exclusive authority over matters pertaining to bar admissions. *See Colo. Sup. Ct. Grievance Comm. v. Dist. Ct.*, 850 P.2d 150, 152 (Colo. 1993) (en banc). The state trial court did not mention § 1983 or address whether the invoked jurisdictional limitation was a valid basis for denying

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§ 1257, the only federal court with jurisdiction to review state court judgments is the Supreme Court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005) (discussing *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 482 (1983), and *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 414-16 (1923)).

enforcement of the federal rights involved. Mr. Smith appealed this decision to the Colorado Court of Appeals.

He subsequently filed the two actions currently before us. In the first, he sued the justices of the Colorado Supreme Court, challenging the state court's use of non-precedential unpublished decisions to dispose of appeals. He contends this creates a system "wherein [the Colorado] appellate courts are free to affirm irregular (and even flagrantly unconstitutional) decisions in unpublished opinions – while having no effect upon [the state's] 'official' published law." Rec. (Appeal No. 04-1470), vol. I, doc. 1 at 2. Specifically, he alleges the state trial court failed to follow controlling precedent, and the state's non-publication rules enable an affirmance of that decision without legal accountability.[6] He argues the "continued enforcement and operation of these rules" would deny him various constitutional protections. *Id.* at 7.

In a separate action, Mr. Smith made similar allegations regarding this circuit's use of non-precedential decisions, citing our unpublished

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[6] Mr. Smith does not claim 3 the state practice has prevented him from relying on any unpublished decisions supporting a favorable result in his case, which was the basis for a similar challenge to a federal non-publication rule in *Anastasoff v.United States*, 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000).

resolution of his first federal suit. *See* Rec. (Appeal No. 04-1468), vol. I, doc. 1 at 2-4, 6-9. He contends this practice violates the same rights he invoked in his challenge to the state practice, as well as the International Covenant on Civil and Political Rights. In addition to seeking relief with respect to this court's rules, he requested a writ of mandamus ordering the state trial judge to address the merits of his challenge to the state bar admission process. We address each of his claims in turn.

II

Challenge to State Court Non-Publication Practice

The district court invoked Article III and held that Mr. Smith lacked standing to challenge the state's non-publication practice. The fundamental requirements of standing are an injury in fact caused by the conduct complained of that will likely be redressed by a favorable decision in the case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court concluded that Mr. Smith could not relate the practice he challenges to any cognizable injury to himself. In its view, Mr. Smith "ha[d] alleged nothing more than an interest in the problem concerning the defendants' rules and practices [on publication]," and "[t]hat interest, unaccompanied by a showing that the application of the rule or practice has somehow personally and actually harmed the plaintiff, cannot alone constitute the

injury-in-fact contemplated by the standing doctrine." Rec. (Appeal No. 04-1470), vol. I, doc. 8 at 7.

"Standing is determined as of the time the action is brought." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). Mr. Smith had just taken his state appeal when he filed this action. He was in no position to challenge the adequacy of state appellate review in cases culminating in unpublished opinions unless he could show that he would in fact receive such review from the state court of appeals (and from the state supreme court as well, if it took the case on certiorari). As we have explained,

> an injury in fact must be actual or imminent, not conjectural or hypothetical. Allegations of possible future injury do not satisfy the requirements of Art[icle] III. A threatened injury must be certainly impending to constitute injury in fact. An Article III injury must be more than a possibility. The threat of injury must be both real and immediate.

Id. at 1155 (quotation marks, ellipses and citations omitted). Mr. Smith cannot make this required showing because the manner of resolution of his future appeals is entirely speculative.

Mr. Smith advances two alternative arguments for standing that we briefly address. Invoking the First Amendment and citing *Broadrick v.*

Oklahoma, 413 U.S. 601 (1973), he insists every citizen has standing to challenge judicial practices that render the law less certain, based on the chilling effect such uncertainty has on everyone's exercise of free speech rights. *Broadrick* recognized an exception to the traditional standing requirement of injury personal to the litigant when the litigant challenges a "statute[] *attempting to restrict or burden the exercise of First Amendment rights*," *id.* at 611 (emphasis added), permitting in those circumstances the assertion of a chilling effect on others' constitutionally protected speech to serve as a redressable injury. But the practice at issue here is not directed at the exercise of First Amendment rights.

Mr. Smith contends the uncertainty produced by the use of non-precedential decisions could indirectly affect the exercise of First Amendment rights, asserting one might curtail speech for fear that subsequent litigation will result in an unpublished decision denying constitutional protection in a manner wildly inconsistent with what would have otherwise been decided in a published opinion. That contention is so speculative and riddled with assumptions that it cannot serve as the basis for standing even if the consideration of third-person injury were permissible here. *See Nova Health Sys.*, 416 F.3d at 1155 ("[A]n injury in fact must be actual or imminent, not conjectural or hypothetical."). Mr.

Smith has not cited any authority applying *Broadrick*'s First Amendment standing analysis in similar circumstances, and we decline to take that step.

Mr. Smith also asks us to rely on the principle typically invoked in cases involving mootness that a dispute "capable of repetition, but evading review" can be heard despite the lack of a presently justiciable case or controversy. *See, e.g., Roe v. Wade*, 410 U.S. 113, 125 (1973). While the state courts' ongoing practice certainly satisfies the repetition requirement, there is no reason to think that the practice must evade review. If the state court of appeals decides a case by unpublished opinion, the losing party can object by way of rehearing and/or certiorari review to the state supreme court, whose own practice in this regard may be reviewed by way of rehearing and/or certiorari review by the United States Supreme Court.

In sum, the district court correctly concluded that Mr. Smith lacked standing to challenge his mere anticipation of being affected by the state appellate courts' practice of issuing unpublished decisions. Indeed, we note that Mr. Smith's state appeal was eventually heard by the Colorado Supreme Court and resolved by published decision. *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (en banc), *cert. denied*, 126 S. Ct. 1792 (2006). We affirm the district court's order dismissing Mr. Smith's challenge to Colorado's

non-publication practice.

III

Challenge to Federal Non-publication Practice

When Mr. Smith filed suit against the federal defendants, he had no litigation pending in the Tenth Circuit. The focus of his challenge to this court's use of unpublished decisions was the unfavorable disposition, by unpublished order and judgment, of his prior appeal regarding the constitutionality of the state bar admission process. The proper means for objecting to the non-publication of that decision would have been by petition for rehearing in this court and/or petition for certiorari review by the Supreme Court.[7] Instead, he has sought our review of this prior action by generating an entirely new stream of litigation. Although it is possible that this present case could ultimately result in an unpublished decision, this mere possibility is too speculative to support jurisdiction under Article III. *Nova Health*

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[7] In fact, Mr. Smith filed a petition for rehearing in which he argued that this court had deviated from precedent in its decision and then stated, in passing, that "he ha[d] a right to insist that it do so in a published opinion with precedential value." *Smith v. Mullarkey*, No. 02-1481, Petition for Rehearing, at 1. He also noted the unpublished nature of this court's decision in the petition for mandamus and/or prohibition he filed in the Supreme Court. In neither instance, however, did he argue that the use of unpublished decisions was unconstitutional.

Sys., 416 F.3d at 1155; *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1282 (10th Cir. 2002); *Hutchinson v. Pfeil*, 211 F.3d 515, 520-21 (10th Cir. 2000). Thus, we conclude, neither a collateral challenge relating to Mr. Smith's prior unsuccessful appeal, nor an anticipatory challenge relating to a potential unpublished disposition in this litigation suffices to establish an actual injury that would permit review and redress. Accordingly, the district court properly dismissed Mr. Smith's claims for lack of standing.

We point out that the alleged injury caused by our circuit publication rules need not consistently evade review. Other circuits have addressed the validity of their non-publication rules in cases where the question of the rule's validity arose *in the context of litigation presently before the court*. For example, courts have considered the constitutionality of publication rules where an unpublished decision relevant to the merits of an appeal was pressed by a litigant who insisted it be deemed binding precedent contrary to the circuit rule, *see Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1366-67 (Fed. Cir. 2002), or was opposed by a litigant who insisted it be disregarded pursuant to the circuit rule, *see Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). Such rules have also been scrutinized where an attorney violated a circuit rule prohibiting citation to non-precedential

decisions and sought to avoid proposed disciplinary action by challenging the validity of the rule. *See Hart v. Massanari*, 266 F.3d 1155, 1159-60 (9th Cir. 2001). As demonstrated in these cases, a circuit non-publication rule may be challenged in the circuit court when application of the rule in a live proceeding before that court directly implicates the interest of a party or counsel in that proceeding. Such is not the case here.

IV

Mandamus Relief against State Trial Judge

The state trial court held it lacked jurisdiction to consider constitutional claims stemming from the denial of Mr. Smith's admission to the bar because jurisdiction to hear such claims was lodged exclusively with the Colorado Supreme Court. Mr. Smith sought mandamus relief from the federal district court to compel the state trial judge's consideration of his constitutional claims. The district court summarily rejected his claim for lack of jurisdiction under *Olson v. Hart*, 965 F.2d 940, 942 (10th Cir. 1992), which held that "[f]ederal courts have no authority to issue a writ of mandamus to a state judge." Although he acknowledges this limitation on the authority of federal courts, Mr. Smith argues the district court erred in not construing his mandamus request as a claim for injunctive relief under 42 U.S.C. § 1983. *See Olson*, 965 F.2d at 943 ("We may also construe

a pro se petition for a writ of mandamus as an action for . . . declaratory relief under 42 U.S.C. § 1983."). We noted in *Olson*, however, that "section 1983 injunctive relief is available" only if "appellant can show he was deprived of a federal right." *Id.*

In *Olson*, the plaintiff alleged the state court judge, out of spite, refused to sign a journal entry necessary to the exercise of his right to appeal. We held, if the allegation were true, the judge's arbitrary and capricious action would violate the plaintiff's due process rights and present a cognizable § 1983 claim. *Id.* Here, Mr. Smith has requested mandamus relief claiming that the state trial court erred by limiting its jurisdiction in accordance with state law precedent, *see People v. Buckles*, 453 P.2d 404 (Colo. 1968); *Colo. Sup. Ct. Grievance Comm. v. Dist. Ct.*, 850 P.2d 150, 154 (Colo. 1993), and failing to consider claims that his denial of admission to the bar violated his constitutional rights. Although he contends the state court has refused to entertain his federal claims in violation of the Supremacy Clause, we note that the state courts have not shut their doors to federal claims but have simply restricted challenges to individual bar admission decisions to Colorado Supreme Court jurisdiction. Mr. Smith directs us to no precedent establishing that Colorado violated his federal rights by vesting exclusive jurisdiction of the regulation of lawyers in its Supreme Court. Accordingly, we decline to

recast his request for mandamus as a § 1983 claim and we adhere to our general prohibition on issuing a writ of mandamus to a state court judge.

Based on the foregoing analysis, we hold that the district court properly dismissed all of the claims asserted in the actions consolidated in this appeal.[8] Finally, we **DENY** the several motions that remain pending because none of them affects our analysis of either case or warrants relief in any collateral respect.

We **AFFIRM** the judgments of the district court.

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[8] There are vague and conclusory references in Mr. Smith's briefing to an asserted tort liability of defendant Salazar, former Colorado Attorney General. Neither these references nor the underlying pleadings in the case remotely establish the existence of a cognizable claim

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

[stamp]
Civil Case No. 04-RB-1222 (OES)

KENNETH L. SMITH,

Plaintiff,

v.

THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT, et al.

Defendants.

ORDER ADOPTING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Blackburn, J.

This matter is before me on the "...

Recommendation For Denial Of Writ Of Mandamus, Denial Of Preliminary Injunction And For Dismissal Of Action" [#14], filed September 28, 2004. The Magistrate Judge recommends as follows: 1) that the Plaintiff's Motion For Writ Of Mandamus [#8] filed September 27, 2004 be denied; 2) that Plaintiff's Motion For Preliminary Injunction [#9] filed September 27, 2004, be denied; and 3) that Plaintiff's Complaint [#1] filed June 14, 2004, be dismissed with prejudice. The Plaintiff filed objections [#16] on October 7, 2004. I approve and adopt the recommendation.

As required by **28 U.S.C. § 636(b),** I have reviewed *de novo* all portions of the recommendation to which objections have been filed, and have considered carefully the recommendation, the objections, and the applicable case law. In addition, because the Plaintiff is proceeding pro se,[9] I have construed his pleadings more liberally and held them to a less stringent standard than formal pleadings drafted by lawyers. *See* **Hall v. Bellmon**, 935 F.2d 1106, 1110 (10th Cir. 1991). I find Plaintiff's objections to be without merit. The recommendation is detailed, circumstantiated, and well-reasoned. Therefore, I find and conclude that the arguments advanced, the authorities cited, the findings of

---

[9] I treat the plaintiff as a pro se litigant notwithstanding his legal education, training, and experience.

fact, conclusions of law, and recommendations proposed by the Magistrate Judge should be approved and adopted.

THEREFORE, IT IS ORDERED as follows:

1. That the "**... Recommendation For Denial Of Writ Of Mandamus, Denial Of Preliminary Injunction And For Dismissal Of Action**" [#14], filed September 28, 2004, is **APPROVED AND ADOPTED** as an order of this court;

2. That the Plaintiff's Motion For Writ Of Mandamus [#8] filed September 27, 2004 **IS DENIED**;

3. That the Plaintiff's Motion For Preliminary Injunction [#9] filed September 27, 2004, **IS DENIED**;

4. That Plaintiff's Complaint [#1] filed June 14, 2004, **IS DISMISSED WITH PREJUDICE;**

5. That Plaintiff's Motion To Consolidate Actions (Incorporating Authority) [#15] filed October 7, 2004, **IS DENIED AS MOOT**; and

6. That Plaintiff's Motion For Enlargement Of Time [#17] filed October 7, 2004, **IS DENIED AS MOOT.**

Dated October 14, 2004, at Denver, Colorado.

BY THE COURT:

__/s/_____

Robert E. Blackburn
United States District

Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

[stamp]
Civil Case No. 04-RB-1223 (OES)

KENNETH L. SMITH,

Plaintiff,

v.

THE HONORABLE MARY J. MULLARKEY,, et al.

Defendants.

ORDER ADOPTING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Blackburn, J.

This matter is before me on the "... **Recommendation For Dismissal Of Action**" [#8], filed September 28, 2004. The Magistrate Judge recommends that Plaintiff's Complaint [#1] filed

June 14, 2004, be dismissed with prejudice. The Plaintiff filed objections [#11] on October 7, 2004. I approve and adopt the recommendation.

As required by **28 U.S.C. § 636(b)**, I have reviewed *de novo* all portions of the recommendation to which objections have been filed, and have considered carefully the recommendation, the objections, and the applicable case law. In addition, because the Plaintiff is proceeding pro se,[10] I have construed his pleadings more liberally and held them to a less stringent standard than formal pleadings drafted by lawyers. *See* **Hall v. Bellmon**, 935 F.2d 1106, 1110 (10th Cir. 1991). I find Plaintiff's objections to be without merit. The recommendation is detailed, circumstantiated, and well-reasoned. Therefore, I find and conclude that the arguments advanced, the authorities cited, the findings of fact, conclusions of law, and recommendations proposed by the Magistrate Judge should be approved and adopted.

THEREFORE, IT IS ORDERED as follows:

1. That the **"... Recommendation For Denial Of Writ Of Mandamus, Denial Of Preliminary Injunction And For Dismissal Of Action"** [#8], filed

---

[10] I treat the plaintiff as a pro se litigant notwithstanding his legal education, training, and experience.

September 28, 2004, is **APPROVED AND ADOPTED** as an order of this court;

2. That Plaintiff's Complaint [#1] filed June 14, 2004, **IS DISMISSED WITH PREJUDICE;**

3. That Plaintiff's Motion To Consolidate Actions [#10] filed October 7, 2004, **IS DENIED AS MOOT**; and

4. That Plaintiff's Motion For Enlargement Of Time [#12] filed October 7, 2004, **IS DENIED AS MOOT.**

Dated October 14, 2004, at Denver, Colorado.

BY THE COURT:

__/s/_____

Robert E. Blackburn
United States District Judge

75

Supreme Court, U.S.
FILED

07-736 OCT 19 2007

OFFICE OF THE CLERK

No. (2)

In The
Supreme Court of the United States

KENNETH L. SMITH,
Petitioner,

v.

UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT, *et al.*,
Respondents,

KENNETH L. SMITH,
Petitioner,

v.

HON. MARY J. MULLARKEY, *et al.*,
Respondents,

Supplemental Appendix

Kenneth L. Smith,
in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

No. _____

In The

Supreme Court of the United States

KENNETH L. SMITH,

Petitioner,

v.

UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT, *et al.*,

Respondents.

KENNETH L. SMITH,

Petitioner,

v.

HON. MARY J. MULLARKEY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

Kenneth L. Smith,
in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

[The following document has been submitted pursuant to a deficiency letter dated October 16, 2007. As such, it will be timely filed if transmitted on or before December 14, 2007.]

TABLE OF CONTENTS

District Court Recommendation
(Case No. 04-RB-1222 (OES) 3

District Court Recommendation
(Case No. 04-RB-1223 (OES) 30

Opinion of the Tenth Circuit
(Case No. 04-1468/04-1470) 43

Tenth Circuit Order denying rehearing 59

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[stamp dated Sep. 28, 2004]
Civil Case No. 04-RB-1222 (OES)

KENNETH L. SMITH,

Plaintiff,

v.

THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT,
THE JUDICIAL COUNCIL FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, HON. EDWARD W. NOTTINGHAM, in his personal capacity only,
HONS. MARY BECK BRISCOE, STEVEN H. ANDERSON, and JAMES E. BARRETT, in their personal capacities only,
HON. H. JEFFREY BAYLESS, both personally and in his representative capacity as the chief judge of the DISTRICT COURT, CITY AND COUNTY OF DENVER,
HON. KEN SALAZAR, in his personal capacity only, and JOHN DOES 1-99,

Defendants.

ORDER DENYING RECUSAL and
RECOMMENDATION FOR DENIAL OF WRIT OF
MANDAMUS, DENIAL OF PRELIMINARY
INJUNCTION AND FOR DISMISSAL OF ACTION

O. Edward Schlatter, United States Magistrate Judge

INTRODUCTION

Under the Order of Reference to United States Magistrate Judge issued in this matter pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed.R.Civ.P. 72(a) and (b), this case has been referred to me for purposes of ruling on nondispositive issues and making recommendations on any dispositive matters of this lawsuit. Pending before the court are plaintiff's Motion For Recusal Of Magistrate Judge Schlatter, Motion For Preliminary Injunction, and Motion For Writ Of Mandamus. Pursuant to D.C.COLO.LCivR 7.1C, the judicial officers of this court are not precluding from ruling on a motion at any time after it is filed.

The plaintiff's rights to seek review or reconsideration of the recommendation, by filing objections within ten days, are attached hereto, and are entitled "Advisement Under Fed. R. Civ. P. 72."

BACKGROUND

Plaintiff filed a 13-page Complaint on June 14, 2004. From a review of the pleading based on the motions filed by the plaintiff, this action appears to arise from the dismissal of plaintiff's lawsuit in Smith v. Mallarkey[sic], et al., Civil Action No. 00-N-2225 (D.Colo. 2000). The basis for the claims contained in plaintiff's suit in Civil Action No. 00-N-2225 included issues arising out of the denial of plaintiff's application for admission to the Bar of the State of Colorado. Pursuant to a Motion To Dismiss For Lack Of Subject Matter Jurisdiction And, Alternatively On Grounds Of Absolute Judicial And Quasi-Judicial Immunity, the Honorable Edward W. Nottingham dismissed the case based on three grounds: (1) this court lacked subject matter jurisdiction over the case, (2) the defendants were absolutely immune from the allegations concerning money damages, and plaintiff's pleading failed to state a claim upon which relief could be granted. See Id. at Docket #31. Plaintiff appealed the decision, and in an unpublished opinion, Judge Nottingham's ruling that the federal district court lacked subject matter jurisdiction over the action was affirmed. Id. at Docket #52. Plaintiff further sought review by the United States Supreme Court, Id. at Docket #53, but his petition was denied, Id. at Docket #56.

This lawsuit challenges the actions of various persons and entities in connection with the

proceedings in Civil Action No. 00-N-2225 and also an action filed in Colorado state court. Plaintiff's Complaint is less than a model of clarity, but does specifically delineate three claims for relief. The first claim seeks declaratory judgment under 42 U.S.C. § 1983 based on defendants alleged infringement of plaintiff's Constitutional rights. Plaintiff's Second Claim requests a writ of mandamus be entered by this court, compelling defendant Bayless "to do the job he is being paid to do, and has an indisputable duty to do: hear federal-law claims brought before him." The Third Claim For Relief seeks damages against the defendants under 42 U.S.C. § 1983 for the alleged violation of plaintiff's Constitutional rights.

On September 27, 2004, plaintiff filed the motions currently pending before the court. First, plaintiff seeks my recusal from the case because I served (and can be expected to serve) as the direct subordinate of Judge Edward W. Nottingham, one of the defendants in this case. Second, plaintiff seeks the issuance of a preliminary injunction, seeking to enjoin the continued operation and application of 10th Cir. R. 36. Third, plaintiff seeks the issuance of a writ of mandamus directing the Denver District Court to hear the case of Smith v. Mullarkey, et al., Case No. 02-CV-127.

DISCUSSION

I. Plaintiff's *Pro Se* Status

As a general rule, persons proceeding in this court pro se and untrained in the law are entitled to have their pleadings liberally construed. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). I take judicial notice[1] of the fact that the plaintiff in this case is a graduate of the University of Denver School of Law, that he graduated in the top quarter of his class, and that he passed both the Colorado Bar Examination and the MPRE. See, Smith, Civil Action No. 00-N-2225, Docket #5, FIRST AMENDED COMPLAINT AND JURY DEMAND. Plaintiff claims that he has been denied admission to the Bar of the State of Colorado based, at least in part, on his refusal to submit to a psychiatric examination. Id. His education, training, and legal abilities are not in question. Additionally, plaintiff is an experienced litigant, having previously represented himself in this court, in his appeal to the Tenth Circuit, and on petition to the United States

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[1] This Court may take judicial notice of court documents and matters of public record. See, e.g., Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996); Henson v. CSC Credit Services, 29 F.3d 280,v 284 (7th Cir. 1994); see, also, Southmark Prime Plus, L.P. v. Falzone, 776 F.Supp. 888, 892 (D.Del. 1991).

Supreme Court.

Accordingly, plaintiff's pleadings in this action are not entitled to the deferential or liberal construction standards afforded to pro se litigants who are untrained in the law.

II. Motion For Recusal.

The standard for impartiality under 28 U.S.C. § 455(a) is an objective one, requiring recusal only if "a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993) (citations omitted). In this case, recusal is not appropriate. Based on the facts in the plaintiff's recent motion, he has not demonstrated that a reasonable person would question my impartiality.

Plaintiff does not allege actual partiality on my part, nor has he shown an appearance of partiality. Plaintiff's entire argument centers around the fact that I serve as a Magistrate Judge in this District, making me a direct subordinate to the Article III Judges of this court, one of which he has named as a defendant in this action. Plaintiff ponders that "[n]o matter how Magistrate Schlatter might rule on a contentious issue, his impartiallity could reasonably be questioned." However, "adverse rulings cannot in themselves form the appropriate grounds for disqualification." Green v. Branson, 108 F.3d 1296, 1305 (10th Cir. 1997). Further, the provisions of Fed.R.Civ.P. 72 operate

as a "checks and balances" mechanism to counter the plaintiff's argument. Accordingly, plaintiff's motion seeking my recusal will be denied.

III. Motion For Writ Of Mandamus

A federal court may not issue a writ of mandamus directing state courts or their judicial officers in the performance of their duties. See Olson v. Hart, 965 F.2d 940, 942 (10th Cir. 1992). Accordingly, plaintiff's motion is legally frivolous, and should be denied.

IV. Motion For Preliminary Injunction

A party seeking a preliminary injunction must show: 1) a substantial likelihood that the movant eventually will prevail on the merits; 2) that the movant will suffer irreparable injury unless the injunction issues; 3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and; 4) that the injunction, if issued, would not be adverse to the public interest. Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980). Because injunctive relief is an extraordinary remedy, "the right to relief must be clear and unequivocal." Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1065-66 (10th Cir. 2001) (quotation omitted). A heightened burden applies to preliminary injunctions that would disturb the status quo, are mandatory as opposed to prohibitory, or provide the moving party with substantially all the relief

the party may recover after a full trial on the merits. *See* SCLC IFC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098-99 (10th Cir. 1991). In such instances, the moving party must show that the four factors listed above weigh heavily and compellingly in the movant's favor. Id.

A. Likelihood of prevailing on the merits.

Plaintiff posits that "[t]he question here isn't so much whether [he] should prevail but rather, one of how he can possibly lose." However, a moving party demonstrates a substantial likelihood of prevailing on the merits of their claim by presenting "a prima facie case showing a reasonable probability that it will ultimately be entitled to the relief sought." Autoskill, Inc. v. National Educational Support Systems, Inc., 994 F.2d 1476, 1487 (10th Cir. 1993).

In the portion of his Complaint entitled "Summary of the Case," plaintiff contends that 10th Cir. R. 36 is unconstitutional and that it's application to him violates his federal Constitutional rights. Plaintiff seeks to vindicate these rights through the remedial provisions of 42 U.S.C. § 1983. Plaintiff also contends that the International Covenant on Civil and Political Rights ("ICCPR") has been violated. See Smith, Civil Action No. 04-RB-1222, Docket #1, COMPLAINT, p. 4.

With regard to the ICCPR,

> [I]t is clear that the ICCPR is not binding on the federal courts. Courts in the United States are bound to give effect to international law and to international agreements, except that a non-self-executing agreement will not be given effect as law in the absence of necessary authority. When the Senate ratified the ICCPR, it specifically declared that the provisions thereof were not self-executing. And, since that time, Congress has never enacted implementing legislation for the ICCPR.

Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002) (quotations and citations omitted); see, also, Sosa v. Alvarez-Machain, 124 S.Ct. 2739, 2763 (2004) ("The United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts.").

Accordingly, the ICCPR cannot provide either a substantive or remedial basis for plaintiff's claims. Viewing the plaintiff's Complaint under § 1983, or otherwise, he also cannot prevail:

1. Plaintiff's First and Third Claims

In his First Claim For Relief, plaintiff alleges that:

> The continues enforcement and operation of 10th Cir. R. 36 will deny [plaintiff] an array

> of federal rights, . . . The continued enforcement and operation of 10th Cir. R. 36 infringes upon **every** right [plaintiff] might have under the Constitution of the United States and/or federal law -- to the extent that it delegates judicial enforcement of those rights ostensibly secured to him thereunder to the unfettered discretion of this Circuit's courts.

Smith, Civil Action No. 04-RB-1222, Docket #1, COMPLAINT, p. 10 (emphasis in original). Plaintiff's Third Claim For Relief seeks damages for the alleged infringement of his rights. Id. at p. 11.

As set forth in the Tenth Circuit Rules, 10th Cir. R. 36 provides:

> 36.1 **Orders and judgments.** The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.
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> 36.2 **Publication.** When the opinion of the district court, an administrative agency, or the Tax Court has been published, this

court ordinarily designates its disposition for publication. If the disposition is by order and judgment, the court will publish only the result of the appeal.

36.3 **Citation of unpublished opinions/orders and judgments**

(A) Not precedent. Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel.

(B) Reference. Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if:

(1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and

(2) it would assist the court in its disposition.

(C) Attach Copy. A copy of an unpublished decision must be attached to any document that cites it. If an unpublished decision is cited at oral argument, the citing party must provide a copy to the court and the other parties.

10th Cir. R. 36.

A review of plaintiff's Complaint, however, demonstrates that he has failed to allege a cognizable injury under the standing doctrine for his claims. As the Supreme Court has repeatedly stated, the "core" or "bedrock" elements of standing require that a plaintiff establish a (1) legally recognized injury, (2) caused by the named defendant that (3) is capable of legal or equitable redress. See, e.g., Raines v. Byrd, 521 U.S. 811, 818-19 (1997) (noting the "bedrock requirement" of standing generally and the "strict compliance" of showing a legally recognized injury specifically); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (identifying the three "core" component[s] of standing"). The party seeking to invoke the jurisdiction of the federal courts has the burden of alleging specific facts sufficient to satisfy these three elements. See Raines, 521 U.S. at 818 (plaintiffs must satisfy standing requirements "based on the complaint. . . .").

The injury that a plaintiff alleges must be unique to that plaintiff, one in which he has a "personal stake" in the outcome of litigation seeking to remedy that harm. See Raines, 521 U.S. at 818-19. In addition, the plaintiff must have sustained a "concrete" injury, "distinct and palpable . . . as opposed to merely abstract." Whitmore v. Arkansas, 496 U.S. 149, 155 (1990). The injury must have actually occurred or must occur imminently, hypothetical, speculative, or other "possible future" injuries do not count in the standing analysis.

See Id. Though these standing principles do not readily lend themselves to "mechanical application," Allen v. Wright, 468 U.S. 737, 751 (1984), nor do they require an "ingenious academic exercise in the conceivable," Lujan, 504 U.S. at 566.

In this case, there is little difficulty in applying these principles and concluding that plaintiff has failed to allege a legally cognizable injury, as required by the standing doctrine. First, his "throw everything up against the wall and see what sticks" style of alleging a violation of his rights not only contravenes the principles of notice pleading, but alleges no direct facts, or facts from which a reasonable inference could be drawn, of an injury-in-fact upon which to base standing in this case. Further, the harm that plaintiff describes in his Complaint deals only with the speculative loss of a plethora of rights because he feels the Tenth Circuit rule "virtually guarantee[s] a stunningly slipshod work product" and "empower[s] judges to write 'designer law' binding only upon the parties." Plaintiff's allegations do demonstrate his extreme dissatisfaction with the fact that the merits of his claims in Civil Action No. 00-N-2225 were not addressed. However, the Supreme Court's rulings in Rooker v. Fid. Trust Co., 263 U.S. 413, 415-16 (1923) and Dist. of Columbia Ct. of App. v. Feldman, 460 U.S. 462, 483 n. 16 (1983) were applied to his case and precluded review of plaintiff's claims, not the provisions of 10th Cir. R. 36. Smith, Civil Action No. 00-N-2225, Docket #52,

ORDER AND JUDGMENT issued by the Tenth Circuit. A written opinion was, in fact, issued by the Tenth Circuit and designated as unpublished. Id.

Notably, the constitutionality of Circuit Rules concerning unpublished opinions has been the subject of differing opinions among federal judges. See Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) (Ninth Circuit rule on citation of unpublished opinions constitutional); Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (Eighth Circuit rule on citation of unpublished opinions unconstitutional), *vacated as moot on rehearing en banc*, 235 F.3d 1054 (8th Cir. 2000)[2]; see, also,

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[2] Judge Arnold of the Court of Appeals for the Eighth Circuit authored an opinion which held that the Circuit's prohibition on the use of unpublished opinions was unconstitutional under Article III, because it allows judges to go beyond their "judicial power," when they issue opinions with no precedential value. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000). Nevertheless, the matter now remains an open question in that Circuit, since the ruling was later vacated as moot. See Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000). The Eighth Circuit's analysis on this issue has been soundly rejected. In the Ninth Circuit, th Circuit's similar prohibition was challenged by an attorney, who urged the court to rely on an unpublished opinion when deciding his case. Writing for the Ninth Circuit, Judge Kozinski found no support in Article III, or elsewhere in the Constitution, for the premise that

Symbol Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1366-68 (Fed.Cir. 2002) (rejecting Anastasoff and adopting Hart). However, unlike the litigants in Hart and Anastasoff, plaintiff has no discernible injury upon which to base standing to challenge

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the "judicial power" contains limitations which forbid judges from employing local rules that prohibit the use of unpublished opinions. Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001). Judge Kozinski held that the Ninth Circuit's rule was constitutional and also necessary to preserve principles of judicial economy in today's busy legal system. Id. at 1179-80. The Judge warned against reading such limitations into the judicial power, stating, "we should exercise considerable caution in recognizing those limitations, lest we freeze the law into the mold case in the eighteenth century." Id. at 1162.

the constitutionality of 10th Cir. R. 36.3. Plaintiff has demonstrated no unpublished case on point to his litigation which he has been precluded from citing as precedent, because of possible sanctions or other tangible harm (like in Hart), or that an unpublished but authoritative in-Circuit decision would be dispositive of the issue under litigation (as in Anastasoff). The opinion issued by the Tenth Circuit in plaintiff's appeal of 00-N-2225 is designated as an unpublished opinion, but no facts alleged by the plaintiff show an injury-in-fact arising from such a designation.

The Tenth Circuit written opinion clearly evidences the analysis and reasoning of the appellate court, and applies Supreme Court and Tenth Circuit precedent in affirming the District Court ruling. Plaintiff was not precluded from further appeal of the decision based upon its unpublished status. While plaintiff may feel that at sometime in the future this status may have an impact upon him, the Supreme Court has rejected the contention that an injury occurring "some day" can satisfy the injury-in-fact requirement of the standing doctrine. See Lujan, 504 U.S. at 564; see, also, Whitmore, 495 U.S. at 157.

In his Complaint and motion, plaintiff contends that he is raising a "reverse-*Anastasoff*" problem, in trying to get the courts to follow binding precedent of the United States Supreme Court and their respective jurisdictions. However, the Supreme Court has rejected any argument that a plaintiff

can establish standing solely on his or her interest in seeing the federal courts or other governmental bodies "perform their duties" and abide by the Constitution. See Whitmore, 495 U.S. at 160 ("'This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.'" (*quoting* Allen, 468 U.S. at 754); see, also, City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (asserting that a "federal court may not entertain a claim by any or all citizens who [do] nothing more than assert that certain practices of law enforcement . . . are unconstitutional.").

Under the allegations of his Complaint, and the arguments of his motion, plaintiff has alleged nothing more than an interest in what he feels is a problem concerning the rule in this Circuit governing disposition of cases without opinion or citation of unpublished opinions. That interest, unaccompanied by a showing that the application of the rule has somehow personally and actually harmed the plaintiff, cannot alone constitute the injury-in-fact contemplated by the standing doctrine. *Cf.* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (A "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . ." (citation omitted)).

Because the plaintiff cannot demonstrate standing in this case, he cannot present a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief he seeks with regard to his first or third claims.

2. Plaintiff's Second Claim For Relief.

In his second claim, plaintiff seeks a writ of mandamus ordering defendant Bayless, Chief Judge of the District Court, City and County of Denver, to "do the job he is being paid to do." However, as noted with regard to plaintiff's Motion For Writ of Mandamus, a federal court may not issue a writ of mandamus to a state judge. See Olson, 965 F.2d at 942. Accordingly, plaintiff cannot prevail on the merits of his second claim.

3. Conclusion.

This court is without jurisdiction to consider plaintiff's second claim, and plaintiff lacks an injury-in-fact to establish standing for the remainder of his claims. Therefore, the likelihood of plaintiff's success on the claims he presents in his Complaint is not a factor which weighs in favor of the plaintiff.

B. Irreparable Injury.

Plaintiff's arguments concerning irreparable injury center around the mandamus relief he has requested against Judge Bayless and his dissatisfaction with the rulings he received in Civil Action No. 00-N-2225. Since this court is without power to

issue a writ of mandamus to Judge Bayless, and certainly has no power to reopen or revisit the ruling made by the Tenth Circuit on appeal in Civil Action No. 00-N-2225, plaintiff's arguments fail to demonstrate that he will be irreparably harmed if an injunction is not issued.

The injunction that is sought by defendant is exceptionally extraordinary in requesting that this court enjoin the application of a Circuit Rule governing policy and procedure. The issues of whether this court has authority to enjoin the application and operation of policies and procedures of a higher appellate court aside,[3] plaintiff has failed to present evidence that would warrant such extraordinary intervention by this court. Plaintiff clearly demonstrates his displeasure at the fact that his case in this court in Civil Action No. 00-N-

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[3] Cf. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943) (writ of mandamus has traditionally been used in federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."); see, also, Panko v. Rodak, 606 F.2d 168, 171 n. 6 (7th Cir. 1979) ("[I]t seems axiomatic that a lower court may not order the judges or officers of a higher court to take an action."); Nolan v. Judicial Council of the Third Circuit, 346 F.Supp. 500, 512-13 (D.N.J. 1972) (review of the actions of a judicial council by a district court would seem to "present serious incongruities and practical problems . . . .").

2225 was not decided on the merits; however, once again, review of his claims was barred by Supreme Court precedent (the very action plaintiff appears to argue for in this lawsuit), not by application or operation of the Circuit Court rules.

C. Balance of Harms

Plaintiff argues that issuance of the injunction would reduce cost, ultimately reduce the appellate court's workload and avoid the need for repetitive litigation. These are not harms personal to the plaintiff, but in which he could arguably contend that he has an interest as a member of the general public. However, the issuance of a preliminary injunction in this case would disturb the status quo, because it would interfere with the administration and operation of the court system under rules and procedures which have been in place prior to the date plaintiff began any litigation in this regard, and would provide the moving party with substantially all of the relief he would recover after full consideration on the merits. Accordingly the balance of harms does not weigh in plaintiff's favor.

D. Adversity To Public Interest

In sum, the plaintiff argues that the public interest is best served by enjoining of the application of 10th Cir. R. 36 because the public's right to a just and fair resolution overrides the efficient resolution of disputes that the rule may provide to

the courts. The flip side of plaintiff's statements that the public has a right to a fair and just resolution by holding the judiciary accountable, by not letting judges "play God," and by judges not issuing opinions merely having entertainment value are statements and observations made by Judge Kozinski in Hart:

> Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts will, at best, clutter up the law books and databases with redundant and thus unhelpful authority. Yet once they are designated as precedent, they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason. Worse still, publishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts, because different opinion writers may use slightly different language to express the same idea.

Hart, 266 F.3d at 1179.

Further,

> *Anastasoff* suggests that the appointment of more judges would enable courts to write binding opinions in every case. See 223 F.3d at 904. We take no position as to whether there should be more federal judges, that being a policy question for Congress to decide. We note, however, that Congress would have to increase the number of judges by something like a factor of five to allocate to each judge a manageable number of opinions each year. But adding more judges, and more binding precedents, creates its own set of problems by significantly increasing the possibility of conflict within the same circuit as each judge will have an increased body of binding caselaw to consider and reconcile.

Id. at n.39[sic].

Both sides of the public interest in this regard are apparent, each with equal value. Accordingly, this factor does not weigh in favor of the plaintiff.

E. Conclusion.

In sum, the four factors for injunctive relief do not weigh heavily and compellingly in the plaintiff's favor. The alleged harm to the plaintiff does not outweigh the harm to the defendants and the interference with the public interest in the orderly and effective administration of the courts.

Moreover, plaintiff cannot show success on his claims. Accordingly, plaintiff's request for a preliminary injunction should be denied.

V. Viability Of Plaintiff's Complaint

Because the Complaint establishes, on its face, that this court lacks subject matter jurisdiction over plaintiff's second claim, the claim should be dismissed sua sponte. See Fed.R.Civ.P. 12(h)(3) ("[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); see, also, Tuck v. United Servs. Auto. Ass'n, 859 F.2d 842, 844 (10th Cir. 1988) (court has a duty to determine subject matter jurisdiction sua sponte). A court's lack of subject matter jurisdiction cannot be waived by the parties, nor can it be conferred upon the district court by agreement of the parties. Mitchell v. Maurer, 293 U.S. 237, 243 (1934).

Further, the Complaint establishes, on its face, that plaintiff cannot establish standing in this action and therefore has failed to state claims upon which relief can be granted with regard to his first and third claims. The Tenth Circuit has held that a district court may dismiss sua sponte a pro se complaint for failure to state a claim. McKinney v. Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991).

It is true that the Supreme Court has at least parenthetically indicated that, generally speaking, a party cannot "aver[ ]" that it suffered

an injury in fact until it has reached "(the summary judgment stage)"; and that it cannot "prove[ ]" the standing elements until it has reached "(. . . the trial stage)." See Lujan, 504 U.S. at 561 (noting also that, "[a]t the general pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . ."). However, there is no authority indicating that the standing doctrine's injury requirement cannot be the proper basis for a dismissal for failure to state a claim. To the contrary, the Supreme Court decisions both preceding and following Lujan show that this injury element remains the proper basis of a dismissal under Fed.R.Civ.P. 12(b)(6). See, e.g., Raines, 521 U.S. at 817-24, 830 (vacating decision by district court that denied a motion to dismiss for failing to allege a cognizable injury under the standing doctrine); Whitmore, 495 U.S. at 158 (citing, with approval, Supreme Court precedents that sustained the dismissal of a case for lack of standing based on insufficient allegations of injury that appeared in the complaint (*citing among others* Ashcroft v. Mattis, 431 U.S. 171, 172 n.2 (1977); Allen, 468 U.S. at 745-48, 756 (examining allegations in class-action complaint and upholding district court's decision granting a motion to dismiss for want of standing); Lyons, 461 U.S. at 101-02, 105 (examining complaint's allegations of injury and finding them too speculative to satisfy the standing inquiry). Neither the Federal Rules of Civil Procedure nor the Constitution purport to

treat standing any differently from any other issue that a federal court might address at the pleading stage of a case.

I am aware that dismissing a Complaint without notice or opportunity to amend is proper only "when it is patently obvious that plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile." Curely v. Perry, 246 F.3d 1278, 1281-82 (10th Cir. 2001). In this action, it would be futile to allow an amendment. Plaintiff's Complaint fails to allege the factual basis for any injury or harm that could remotely approach the threshold requirement of having a personal, concrete, and actual or imminent injury, nor has plaintiff alleged any facts from which such a reasonable inference could be drawn. Plaintiff's allegations center around the fact that the claims he championed in this court in Civil Action No. 00-N-2225 were not reviewed on the merits; however, review was precluded on a jurisdictional bar and not the operation of 10th Cir. R. 36. Plaintiff claims great metaphysical injury arising out of the application and operation of 10th Cir. R. 36, but alleges no concrete injury upon which to base standing to bring this action.

Plaintiff has proceeded in this court on one set of facts of which he would have known, amounting to a choice made by the plaintiff, not excusable neglect. Plaintiff knew or should have known of the facts upon which any proposed

amendment regarding an injury could be based, but failed to include them in the original complaint. Pallottino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir. 1994) (*quoting* State Distributors, Inc. v. Glenmore Distilleries, 738 F.2d 405, 416 (10th Cir. 1984) (citations omitted)).

Plaintiff cannot prevail on his first or third claim, and those claims should also be dismissed *sua sponte*. This, coupled with the lack of jurisdiction over plaintiff's second claim, warrants refusal of an opportunity to amend the Complaint, resulting in the complete dismissal of this action.

CONCLUSION

Based upon the foregoing, it is hereby **ORDERED** that plaintiff's Motion For Recusal Of Magistrate Judge Schlatter [Filed September 17, 2004; Docket #10] [sic] is **DENIED**.

Based on the Complaint on file herein, and the motions as made by the plaintiff, it is **RECOMMENDED** as follows:

1. Plaintiff's Motion For Writ Of Mandamus [Filed September 27, 2004; Docket #8] be **DENIED.**

2. Plaintiff's Motion For Preliminary Injunction [Filed September 27, 2004; Docket #9] be **DENIED.**
3. Plaintiff's Complaint [Filed June 14, 2004;

Docket #1] be **DISMISSED**, with prejudice.

Dated this _____ day of September, 2004 [original undated].

BY THE COURT:

/s/_____
O. Edward Schlatter
United States Magistrate Judge

[Fed. R. Civ. P. 72 notice elided for brevity]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
[stamp dated Sep. 28, 2004]

Civil Case No. 04-RB-1223 (OES)

KENNETH L. SMITH,

Plaintiff,

v.

HONS. MARY J. MULLARKEY,
REBECCA LOVE KOURLIS,
MICHAEL L. BENDER,
GREGORY J. HOBBS, JR.,
ALEX J. MARTINEZ,
NATHAN B. COATS, and
NANCY E. RICE, in their official capacities as
Justices of the Colorado Supreme Court,

Defendants.

RECOMMENDATION FOR DISMISSAL OF ACTION

O. Edward Schlatter, United States Magistrate Judge

INTRODUCTION

Under the Order of Reference to United States Magistrate Judge issued in this matter pursuant to 28 U.S.C. § 636(b)(1)(A) and (B) and Fed.R.Civ.P. 72(a) and (b), this case has been referred to me for purposes of ruling on nondispositive issues and making recommendations on any dispositive matters of this lawsuit. The plaintiff's rights to seek review or reconsideration of the recommendation, by filing objections within ten days, are attached hereto, and are entitled "Advisement Under Fed. R. Civ. P. 72."

BACKGROUND

Plaintiff filed an 8-page Complaint on June 14, 2004. From a review of the pleading in preparation for pretrial case management, this action arises from the dismissal of plaintiff's lawsuit filed in Denver District Court, entitled Smith v. Mallarkey[sic], Case No. 02-CV-127. Plaintiff asserts that in the state court action, he alleged violation of his federal rights under 42 U.S.C. § 1983 and facial challenges to the constitutionality of Colo.R.Civ.P. 201, arising out of the summary denial of his 1996 application for admission to the Bar of the State of Colorado in Application of Smith, No. LX-24 (Colo. Jan. 13, 2000). According to the plaintiff, on April 9, 2004, Denver District

Judge H. Jeffrey Bayless entered an Order dismissing the Complaint in Case No. 02-CV-127. Plaintiff contends that Judge Bayless ignored state and federal precedent in his ruling, and that based upon the rules and practices of the state appellate courts, promulgated by the Colorado Supreme Court, his case received only "slipshod review" on appeal. Plaintiff particularly takes issue with the court's policy concerning unpublished opinions, which he attaches to his Complaint as Exhibit A.

The Complaint sets forth one claim for relief, seeking a declaratory judgment that the continued enforcement and operation of the rules and/or practices which have been "drafted, implemented, encouraged an sanctioned" by the defendants "infringes upon every right any citizen might have under the Constitution of the United States and/or federal law.

The Complaint establishes, on its face, that plaintiff has failed to state a claim upon which relief can be granted. The Tenth Circuit has held that a district court may dismiss sua sponte a pro se complaint for failure to state a claim. McKinney v. Oklahoma, 925 F.2d 363, 365 (10th Cir. 1991). Accordingly, this claim and the Complaint should be dismissed *sua sponte*.

DISCUSSION

I. Plaintiff's *Pro Se* Status

As a general rule, persons proceeding in this court pro se and untrained in the law are entitled to have their pleadings liberally construed. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). I take judicial notice[4] of the fact that the plaintiff in this case is a graduate of the University of Denver School of Law, that he graduated in the top quarter of his class, and that he passed both the Colorado Bar Examination and the MPRE. See, Smith, Civil Action No. 00-N-2225, Docket #5, FIRST AMENDED COMPLAINT AND JURY DEMAND. Plaintiff claims that he has been denied admission to the Bar of the State of Colorado based, at least in part, on his refusal to submit to a psychiatric examination. Id. His education, training, and legal abilities are not in question. Additionally, plaintiff is an experienced litigant, having previously represented himself in this court, in his appeal to the Tenth Circuit, and on petition to the United States

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[4] This Court may take judicial notice of court documents and matters of public record. See, e.g., Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996); Henson v. CSC Credit Services, 29 F.3d 280,v 284 (7th Cir. 1994); see, also, Southmark Prime Plus, L.P. v. Falzone, 776 F.Supp. 888, 892 (D.Del. 1991).

Supreme Court.

Accordingly, plaintiff's pleadings in this action are not entitled to the deferential or liberal construction standards afforded to *pro se* litigants who are untrained in the law.

II. Plaintiff's Complaint.

A review of plaintiff's Complaint demonstrates that he has failed to allege a cognizable injury under the standing doctrine for his claims. As the Supreme Court has repeatedly stated, the "core" or "bedrock" elements of standing require that a plaintiff establish a (1) legally recognized injury, (2) caused by the named defendant that (3) is capable of legal or equitable redress. See, e.g., Raines v. Byrd, 521 U.S. 811, 818-19 (1997) (noting the "bedrock requirement" of standing generally and the "strict compliance" of showing a legally recognized injury specifically); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (identifying the three "core" component[s] of standing"). The party seeking to invoke the jurisdiction of the federal courts has the burden of alleging specific facts sufficient to satisfy these three elements. See Raines, 521 U.S. at 818 (plaintiffs must satisfy standing requirements "based on the complaint. . . .").

The injury that a plaintiff alleges must be unique to that plaintiff, one in which he has a "personal stake" in the outcome of litigation seeking to remedy that harm. See Raines, 521 U.S. at 818-19.

In addition, the plaintiff must have sustained a "concrete" injury, "distinct and palpable . . . as opposed to merely abstract." Whitmore v. Arkansas, 496 U.S. 149, 155 (1990). The injury must have actually occurred or must occur imminently, hypothetical, speculative, or other "possible future" injuries do not count in the standing analysis. See Id. Though these standing principles do not readily lend themselves to "mechanical application," Allen v. Wright, 468 U.S. 737, 751 (1984), nor do they require an "ingenious academic exercise in the conceivable," Lujan, 504 U.S. at 566.

In this case, there is little difficulty in applying these principles and concluding that plaintiff has failed to allege a legally cognizable injury, as required by the standing doctrine. First, the Complaint alleges no direct facts, or facts from which a reasonable inference could be drawn, of an injury-in-fact upon which to base standing in this case. Further, the harm that plaintiff describes in his Complaint deals only with the speculative loss of a plethora of rights because he feels the defendants' rules and/or practices "empower[ ] judges to write 'designer law' binding upon only the parties, often bearing only accidental resemblance to the 'official' law of Colorado." However, plaintiff is barred "from seeking what in substance would be appellate review of the state judgment in an United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." Kiowa

Indian Tribe of Okla. v. Hoover, 150 F.3d 1163, 1169 (10th Cir. 1998) (quoting Johnson v. DeGrandy, 512 U.S. 997, 1005-06 (1994)).

Notably, the constitutionality of Circuit Rules concerning unpublished opinions has been the subject of differing opinions among federal judges. See Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) (Ninth Circuit rule on citation of unpublished opinions constitutional); Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (Eighth Circuit rule on citation of unpublished opinions unconstitutional), *vacated as moot on rehearing en banc*, 235 F.3d 1054 (8th Cir. 2000)[5]; see, also, Symbol

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[5] Judge Arnold of the Court of Appeals for the Eighth Circuit authored an opinion which held that the Circuit's prohibition on the use of unpublished opinions was unconstitutional under Article III, because it allows judges to go beyond their "judicial power," when they issue opinions with no precedential value. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000). Nevertheless, the matter now remains an open question in that Circuit, since the ruling was later vacated as moot. See Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000). The Eighth Circuit's analysis on this issue has been soundly rejected. In the Ninth Circuit, th Circuit's similar prohibition was challenged by an attorney, who urged the court to rely on an unpublished opinion when deciding his case. Writing for the Ninth Circuit, Judge Kozinski found no support in Article III, or elsewhere in the Constitution, for the premise that

Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1366-68 (Fed.Cir. 2002) (rejecting Anastasoff and adopting Hart). However, unlike the litigants in Hart and Anastasoff, plaintiff has no discernible injury upon which to base standing to challenge

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the "judicial power" contains limitations which forbid judges from employing local rules that prohibit the use of unpublished opinions. Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001). Judge Kozinski held that the Ninth Circuit's rule was constitutional and also necessary to preserve principles of judicial economy in today's busy legal system. Id. at 1179-80. The Judge warned against reading such limitations into the judicial power, stating, "we should exercise considerable caution in recognizing those limitations, lest we freeze the law into the mold case in the eighteenth century." Id. at 1162.

the constitutionality of 10th Cir. R. 36.3. Plaintiff has demonstrated no unpublished case on point to his litigation which he has been precluded from citing as precedent, because of possible sanctions or other tangible harm (like in Hart), or that an unpublished but authoritative in-Circuit decision would be dispositive of the issue under litigation (as in Anastasoff). The Supreme Court has rejected the contention that an injury occurring "some day" can satisfy the injury-in-fact requirement of the standing doctrine. See Lujan, 504 U.S. at 564; see, also, Whitmore, 495 U.S. at 157.

Plaintiff contends that his case differs from Anastasoff and Hart because he challenges the "appellate courts' rights to affirm judgments at clear variance with binding precedent in 'unpublished' opinions." However, the Supreme Court has rejected any argument that a plaintiff can establish standing solely on his or her interest in seeing the federal courts or other governmental bodies "perform their duties" and abide by the Constitution. See Whitmore, 495 U.S. at 160 ("'This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.'" (*quoting* Allen, 468 U.S. at 754); see, also, City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (asserting that a "federal court may not entertain a claim by any or all citizens who [do] nothing more than assert that certain practices of law enforcement . . . are

unconstitutional.").

Plaintiff has alleged nothing more than an interest in the problem concerning the defendants' rules and practices. That interest, unaccompanied by a showing that the application of the rule has somehow personally and actually harmed the plaintiff, cannot alone constitute the injury-in-fact contemplated by the standing doctrine. *Cf.* Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (A "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . ." (citation omitted)).

It is true that the Supreme Court has at least parenthetically indicated that, generally speaking, a party cannot "aver[ ]" that it suffered an injury in fact until it has reached "(the summary judgment stage)"; and that it cannot "prove[ ]" the standing elements until it has reached "(. . . the trial stage)." See Lujan, 504 U.S. at 561 (noting also that, "[a]t the general pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . ."). However, there is no authority indicating that the standing doctrine's injury requirement cannot be the proper basis for a dismissal for failure to state a claim. To the contrary, the Supreme Court decisions both preceding and following Lujan show that this injury element remains the proper basis of

a dismissal under Fed.R.Civ.P. 12(b)(6). See, e.g., Raines, 521 U.S. at 817-24, 830 (vacating decision by district court that denied a motion to dismiss for failing to allege a cognizable injury under the standing doctrine); Whitmore, 495 U.S. at 158 (citing, with approval, Supreme Court precedents that sustained the dismissal of a case for lack of standing based on insufficient allegations of injury that appeared in the complaint (*citing among others* Ashcroft v. Mattis, 431 U.S. 171, 172 n.2 (1977); Allen, 468 U.S. at 745-48, 756 (examining allegations in class-action complaint and upholding district court's decision granting a motion to dismiss for want of standing); Lyons, 461 U.S. at 101-02, 105 (examining complaint's allegations of injury and finding them too speculative to satisfy the standing inquiry). Neither the Federal Rules of Civil Procedure nor the Constitution purport to treat standing any differently from any other issue that a federal court might address at the pleading stage of a case.

I am aware that dismissing a Complaint without notice or opportunity to amend is proper only "when it is patently obvious that plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile." Curely v. Perry, 246 F.3d 1278, 1281-82 (10th Cir. 2001). In this action, it would be futile to allow an amendment. Plaintiff's Complaint fails to allege the factual basis for any injury or harm that could remotely approach the threshold require-

ment of having a personal, concrete, and actual or imminent injury, nor has plaintiff alleged any facts from which such a reasonable inference could be drawn. Plaintiff's allegations center around the fact that the claims he championed in this court in Civil Action No. 00-N-2225 were not reviewed on the merits; however, review was precluded on a jurisdictional bar and not the operation of 10th Cir. R. 36. Plaintiff claims great metaphysical injury arising out of the application and operation of 10th Cir. R. 36, but alleges no concrete injury upon which to base standing to bring this action.

Plaintiff has proceeded in this court on one set of facts of which he would have known, amounting to a choice made by the plaintiff, not excusable neglect. Plaintiff knew or should have known of the facts upon which any proposed amendment regarding an injury could be based, but failed to include them in the original complaint. Pallottino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir. 1994) (*quoting* State Distributors, Inc. v. Glenmore Distilleries, 738 F.2d 405, 416 (10th Cir. 1984) (citations omitted)). Refusing the plaintiff an opportunity to amend his Complaint would be justified, and plaintiff's lawsuit should therefore be dismissed.

CONCLUSION

Based upon the foregoing, it is **RECOMMENDED** that the plaintiff's Complaint [Filed June 14, 2004; Docket #1] be **DISMISSED**, with prejudice.

Dated this 28th day of September, 2004.

BY THE COURT:

/s/_____
O. Edward Schlatter
United States Magistrate Judge

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

(No. 04-1468) [stamp: Filed May 8, 2007]

KENNETH L. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT; THE JUDICIAL COUNCIL FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT; EDWARD W. NOTTINGHAM, District Judge, in his personal capacity only; HONORABLE MARY BECK BRISCOE, in personal capacity only; HONORABLE STEPHEN H. ANDERSON, in personal capacity only; HONORABLE JAMES E. BARRETT; HONORABLE H. JEFFREY BAYLESS, in personal capacity and in his representative capacity as the chief judge of the District Court, City and County of Denver; KEN SALAZAR, Honorable, in his personal capacity only, and John Does 1-99,

Defendants-Appellees.

(No. 04-1470)
KENNETH L. SMITH,

Plaintiff-Appellant,

v.

MARY J. MULLARKEY; REBECCA LOVE KOURLIS; MICHAEL L. BENDER; GREGORY J. HOBBS, JR.; ALEX J. MARTINEZ; NATHAN B. COATS; NANCY E. RICE, Hons. in their official capacities as Justices of the Colorado Supreme Court,

Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado (D.C. Nos. 04-RB-1222(OES) and 04-RB-1223 (OES))

Submitted on the Briefs:*

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

Kenneth L. Smith, *pro se*

John W. Suthers, Attorney General; and Friedrick C. Haines, First Assistant Attorney General, State of Colorado, Denver Colorado, for Defendants-Appellees.

Before **HOLLOWAY**, **SEYMOUR**, and **BALDOCK**, Circuit Judges.

SEYMOUR, Circuit Judge.

Kenneth L. Smith appeals the district court's dismissal of two separate lawsuits stemming from the denial of his application for admission to the Colorado bar. The present litigation focuses on asserted deficiencies he alleges existed in the judicial process provided to him in his previous legal challenges. In particular, Mr. Smith objects to the resolution of cases by non-precedential unpublished decisions, a practice permitted by

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The cases aretherefore ordered submitted without oral argument.

procedural rules issued and enforced by the Colorado courts and by this circuit.[6] As explained below, we agree with the district court that neither of the cases under review can properly proceed in federal district court. We therefore affirm.

I

Background

Mr. Smith graduated from law school, passed the state bar examination, and passed the professional ethics examination, all prerequisites

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[6] Because the Tenth Circuit Court of Appeals, several circuit judges, and a district judge in the circuit are named defendants in the action challenging this court's publication practice, plaintiff has moved for recusal of all Tenth Circuitjudges and designation of a hearing panel from another circuit. Given "there are no pertinent, particularized allegations of bias," we apply our general rule that, notwithstanding the inclusion of Tenth Circuit judges in the caption, "neither this court nor this panel . . . is disqualified from hearing and resolving this case." *Switzer v. Coan*, 261 F.3d 985, 987 n.1 (10th Cir. 2001) (brackets, quotation marks and citations omitted). Indeed, it seems peculiarly unfitting for one circuit's procedural rules and practices to be governed by judges from another circuit. Such matters are, of course, subject to the judgment of the Supreme Court, which has wide-ranging authority through both case-specific review and its general supervisory power "to intervene to protect the integrity of the federal system." 32 Am. Jur. 2d *Federal Courts* § 473 (discussing authority regarding Supreme Court's supervisory power).

to obtaining a license to practice law in Colorado. When he was ordered to submit to a mental status examination by the Board of Law Examiners' Hearing Panel, however, he refused. Primarily because Mr. Smith refused to submit to that examination, the Hearing Panel recommended to the Colorado Supreme Court that his application be denied. After consideration of the record, including Mr. Smith's application, the Hearing Panel's report and recommendation, Mr. Smith's exceptions to that report, and the responses filed by the Board of Law Examiners, the Colorado Supreme Court denied the application for admission to the State Bar. Mr. Smith then filed an action in federal district court challenging the admission process on constitutional grounds. That action was dismissed pursuant to the *Rooker-Feldman* doctrine.[7] On appeal, this court affirmed in an unpublished Order and Judgment, *see Smith v. Mullarkey*, No. 02-1481, 2003 WL 21350579 (10th Cir. June 11, 2003), and denied Mr. Smith's request for a rehearing. Mr. Smith unsuccessfully

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[7] The *Rooker-Feldman* doctrine holds that under 28 U.S.C. § 1257, the only federal court with jurisdiction to review state court judgments is the Supreme Court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005) (discussing *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 482 (1983), and *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 414-16 (1923)).

sought a writ of mandamus and/or prohibition from the Supreme Court.

In the meantime, Mr. Smith challenged the bar admission process in state court on state and federal (42 U.S.C. § 1983) grounds. The state trial court summarily dismissed for lack of jurisdiction, citing the state supreme court's exclusive authority over matters pertaining to bar admissions. *See Colo. Sup. Ct. Grievance Comm. v. Dist. Ct.*, 850 P.2d 150, 152 (Colo. 1993) (en banc). The state trial court did not mention § 1983 or address whether the invoked jurisdictional limitation was a valid basis for denying enforcement of the federal rights involved. Mr. Smith appealed this decision to the Colorado Court of Appeals.

He subsequently filed the two actions currently before us. In the first, he sued the justices of the Colorado Supreme Court, challenging the state court's use of non-precedential unpublished decisions to dispose of appeals. He contends this creates a system "wherein [the Colorado] appellate courts are free to affirm irregular (and even flagrantly unconstitutional) decisions in unpublished opinions – while having no effect upon [the state's] 'official' published law." Rec. (Appeal No. 04-1470), vol. I, doc. 1 at 2. Specifically, he alleges the state trial court failed to follow controlling precedent, and the state's non-publication rules enable an affirmance of

that decision without legal accountability.[8] He argues the "continued enforcement and operation of these rules" would deny him various constitutional protections. *Id.* at 7.

In a separate action, Mr. Smith made similar allegations regarding this circuit's use of non-precedential decisions, citing our unpublished resolution of his first federal suit. *See* Rec. (Appeal No. 04-1468), vol. I, doc. 1 at 2-4, 6-9. He contends this practice violates the same rights he invoked in his challenge to the state practice, as well as the International Covenant on Civil and Political Rights. In addition to seeking relief with respect to this court's rules, he requested a writ of mandamus ordering the state trial judge to address the merits of his challenge to the state bar admission process. We address each of his claims in turn.

II

Challenge to State Court Non-Publication Practice

The district court invoked Article III and held that Mr. Smith lacked standing to challenge the

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[8] Mr. Smith does not claim 3 the state practice has prevented him from relying on any unpublished decisions supporting a favorable result in his case, which was the basis for a similar challenge to a federal non-publication rule in *Anastasoff v.United States*, 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000).

state's non-publication practice. The fundamental requirements of standing are an injury in fact caused by the conduct complained of that will likely be redressed by a favorable decision in the case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court concluded that Mr. Smith could not relate the practice he challenges to any cognizable injury to himself. In its view, Mr. Smith "ha[d] alleged nothing more than an interest in the problem concerning the defendants' rules and practices [on publication]," and "[t]hat interest, unaccompanied by a showing that the application of the rule or practice has somehow personally and actually harmed the plaintiff, cannot alone constitute the injury-in-fact contemplated by the standing doctrine." Rec. (Appeal No. 04-1470), vol. I, doc. 8 at 7.

"Standing is determined as of the time the action is brought." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). Mr. Smith had just taken his state appeal when he filed this action. He was in no position to challenge the adequacy of state appellate review in cases culminating in unpublished opinions unless he could show that he would in fact receive such review from the state court of appeals (and from the state supreme court as well, if it took the case on certiorari). As we have explained,

> an injury in fact must be actual or

> imminent, not conjectural or hypothetical. Allegations of possible future injury do not satisfy the requirements of Art[icle] III. A threatened injury must be certainly impending to constitute injury in fact. An Article III injury must be more than a possibility. The threat of injury must be both real and immediate.

Id. at 1155 (quotation marks, ellipses and citations omitted). Mr. Smith cannot make this required showing because the manner of resolution of his future appeals is entirely speculative.

Mr. Smith advances two alternative arguments for standing that we briefly address. Invoking the First Amendment and citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), he insists every citizen has standing to challenge judicial practices that render the law less certain, based on the chilling effect such uncertainty has on everyone's exercise of free speech rights. *Broadrick* recognized an exception to the traditional standing requirement of injury personal to the litigant when the litigant challenges a "statute[] *attempting to restrict or burden the exercise of First Amendment rights*," *id.* at 611 (emphasis added), permitting in those circumstances the assertion of a chilling effect on others' constitutionally protected speech to serve as a redressable injury. But the practice at issue

here is not directed at the exercise of First Amendment rights.

Mr. Smith contends the uncertainty produced by the use of non-precedential decisions could indirectly affect the exercise of First Amendment rights, asserting one might curtail speech for fear that subsequent litigation will result in an unpublished decision denying constitutional protection in a manner wildly inconsistent with what would have otherwise been decided in a published opinion. That contention is so speculative and riddled with assumptions that it cannot serve as the basis for standing even if the consideration of third-person injury were permissible here. *See Nova Health Sys.*, 416 F.3d at 1155 ("[A]n injury in fact must be actual or imminent, not conjectural or hypothetical."). Mr. Smith has not cited any authority applying *Broadrick*'s First Amendment standing analysis in similar circumstances, and we decline to take that step.

Mr. Smith also asks us to rely on the principle typically invoked in cases involving mootness that a dispute "capable of repetition, but evading review" can be heard despite the lack of a presently justiciable case or controversy. *See, e.g., Roe v. Wade*, 410 U.S. 113, 125 (1973). While the state courts' ongoing practice certainly satisfies the repetition requirement, there is no reason to think that the practice must evade review. If the state court of appeals decides a

case by unpublished opinion, the losing party can object by way of rehearing and/or certiorari review to the state supreme court, whose own practice in this regard may be reviewed by way of rehearing and/or certiorari review by the United States Supreme Court.

In sum, the district court correctly concluded that Mr. Smith lacked standing to challenge his mere anticipation of being affected by the state appellate courts' practice of issuing unpublished decisions. Indeed, we note that Mr. Smith's state appeal was eventually heard by the Colorado Supreme Court and resolved by published decision. *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (en banc), *cert. denied*, 126 S. Ct. 1792 (2006). We affirm the district court's order dismissing Mr. Smith's challenge to Colorado's non-publication practice.

III

Challenge to Federal Non-publication Practice

When Mr. Smith filed suit against the federal defendants, he had no litigation pending in the Tenth Circuit. The focus of his challenge to this court's use of unpublished decisions was the unfavorable disposition, by unpublished order and judgment, of his prior appeal regarding the constitutionality of the state bar admission process. The proper means for objecting to the non-publication of that decision would have been by petition for rehearing in this court and/or

petition for certiorari review by the Supreme Court.[9] Instead, he has sought our review of this prior action by generating an entirely new stream of litigation. Although it is possible that this present case could ultimately result in an unpublished decision, this mere possibility is too speculative to support jurisdiction under Article III. *Nova Health Sys.*, 416 F.3d at 1155; *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1282 (10th Cir. 2002); *Hutchinson v. Pfeil*, 211 F.3d 515, 520-21 (10th Cir. 2000). Thus, we conclude, neither a collateral challenge relating to Mr. Smith's prior unsuccessful appeal, nor an anticipatory challenge relating to a potential unpublished disposition in this litigation suffices to establish an actual injury that would permit review and redress. Accordingly, the district court properly dismissed Mr. Smith's claims for lack of standing.

We point out that the alleged injury caused by our circuit publication rules need not consistently evade review. Other circuits have addressed the

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[9] In fact, Mr. Smith filed a petition for rehearing in which he argued that this court had deviated from precedent in its decision and then stated, in passing, that "he ha[d] a right to insist that it do so in a published opinion with precedential value," *Smith v. Mullarkey*, No. 02-1481, Petition for Rehearing, at 1. He also noted the unpublished nature of this court's decision in the petition for mandamus and/or prohibition he filed in the Supreme Court. In neither instance, however, did he argue that the use of unpublished decisions was unconstitutional.

validity of their non-publication rules in cases where the question of the rule's validity arose *in the context of litigation presently before the court*. For example, courts have considered the constitutionality of publication rules where an unpublished decision relevant to the merits of an appeal was pressed by a litigant who insisted it be deemed binding precedent contrary to the circuit rule, *see Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1366-67 (Fed. Cir. 2002), or was opposed by a litigant who insisted it be disregarded pursuant to the circuit rule, *see Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). Such rules have also been scrutinized where an attorney violated a circuit rule prohibiting citation to non-precedential decisions and sought to avoid proposed disciplinary action by challenging the validity of the rule. *See Hart v. Massanari*, 266 F.3d 1155, 1159-60 (9th Cir. 2001). As demonstrated in these cases, a circuit non-publication rule may be challenged in the circuit court when application of the rule in a live proceeding before that court directly implicates the interest of a party or counsel in that proceeding. Such is not the case here.

IV

Mandamus Relief against State Trial Judge

The state trial court held it lacked jurisdiction to

consider constitutional claims stemming from the denial of Mr. Smith's admission to the bar because jurisdiction to hear such claims was lodged exclusively with the Colorado Supreme Court. Mr. Smith sought mandamus relief from the federal district court to compel the state trial judge's consideration of his constitutional claims. The district court summarily rejected his claim for lack of jurisdiction under *Olson v. Hart*, 965 F.2d 940, 942 (10th Cir. 1992), which held that "[f]ederal courts have no authority to issue a writ of mandamus to a state judge." Although he acknowledges this limitation on the authority of federal courts, Mr. Smith argues the district court erred in not construing his mandamus request as a claim for injunctive relief under 42 U.S.C. § 1983. *See Olson*, 965 F.2d at 943 ("We may also construe a pro se petition for a writ of mandamus as an action for . . . declaratory relief under 42 U.S.C. § 1983."). We noted in *Olson*, however, that "section 1983 injunctive relief is available" only if "appellant can show he was deprived of a federal right." *Id.*

In *Olson*, the plaintiff alleged the state court judge, out of spite, refused to sign a journal entry necessary to the exercise of his right to appeal. We held, if the allegation were true, the judge's arbitrary and capricious action would violate the plaintiff's due process rights and present a cognizable § 1983 claim. *Id.* Here, Mr. Smith has requested mandamus relief claiming that the

state trial court erred by limiting its jurisdiction in accordance with state law precedent, *see People v. Buckles*, 453 P.2d 404 (Colo. 1968); *Colo. Sup. Ct. Grievance Comm. v. Dist. Ct.*, 850 P.2d 150, 154 (Colo. 1993), and failing to consider claims that his denial of admission to the bar violated his constitutional rights. Although he contends the state court has refused to entertain his federal claims in violation of the Supremacy Clause, we note that the state courts have not shut their doors to federal claims but have simply restricted challenges to individual bar admission decisions to Colorado Supreme Court jurisdiction. Mr. Smith directs us to no precedent establishing that Colorado violated his federal rights by vesting exclusive jurisdiction of the regulation of lawyers in its Supreme Court. Accordingly, we decline to recast his request for mandamus as a § 1983 claim and we adhere to our general prohibition on issuing a writ of mandamus to a state court judge.

Based on the foregoing analysis, we hold that the district court properly dismissed all of the claims asserted in the actions consolidated in this appeal.[10] Finally, we **DENY** the several motions

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[10] There are vague and conclusory references in Mr. Smith's briefing to an asserted tort liability of defendant Salazar, former Colorado Attorney General. Neither these references nor the underlying pleadings in the case

that remain pending because none of them affects our analysis of either case or warrants relief in any collateral respect.

We **AFFIRM** the judgments of the district court.

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remotely establish the existence of a cognizable claim

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KENNETH L. SMITH,

(No. 04-1468)

Plaintiff-Appellant,

v.

UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT; THE JUDICIAL COUNCIL FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT; EDWARD W. NOTTINGHAM, District Judge, in his personal capacity only; HONORABLE MARY BECK BRISCOE, in personal capacity only; HONORABLE STEPHEN H. ANDERSON, in personal capacity only; HONORABLE JAMES E. BARRETT; HONORABLE H. JEFFREY BAYLESS, in personal capacity and in his representative capacity as the chief judge of the District Court, City and County of Denver; KEN SALAZAR, Honorable, in his personal capacity only, and John Does 1-99,

Defendants-Appellees.

KENNETH L. SMITH,

(No. 04-1470)

Plaintiff-Appellant,

v.

MARY J. MULLARKEY; REBECCA LOVE KOURLIS; MICHAEL L. BENDER; GREGORY J. HOBBS, JR.; ALEX J. MARTINEZ; NATHAN B. COATS; NANCY E. RICE, Hons. in their official capacities as Justices of the Colorado Supreme Court,

Defendants-Appellees.

ORDER
Filed July 11, 2007

Before, **HOLLOWAY, SEYMOUR,** and **BALDOCK,** Circuit Judges

Plaintiff-Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of

the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

By: /s/_____ (illegible)
Deputy Clerk